49618

LEMONT NATIONAL BANK, a banking corporation, Plaintiff-Appellee, v. WILLIAM BOZA, WALTER ALEX BOZA, and EDWARD BOZA, Defendants-Appellants.	)	APPEAL FROM THE SUPERIOR COURT OF COOK COUNTY.

65 I.A.2 1

A

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT:

This is an appeal from a decree enjoining defendants from encroaching on plaintiff's property.

Prior to 1890, Main Street in Lemont, Illinois, ran in a generally east and west direction, parallel to a railroad bed located about one-half block north. Around 1890, the railroad bed was relocated to run in a generally northeasterly-southwesterly direction. Main Street was similarly relocated. This change effected the subdivision plat, in that lots were subsequently sold perpendicular to the relocated Main Street.

About 1900, Henry Suhr and Bertha Suhr, his wife, purchased the premises commonly known as 306 Main Street, Lemont, Illinois. The premises contained a two story building. The first floor was used as as a feed store and the second floor as an apartment. At the rear of the premises was a lean-to shed and a combination yard-passageway. To the rear of that was a barn located in part over a creek. The center line of said creek was referred to, in the recorded deeds, as the southern boundary of the premises. On each side of the building was a driveway. Teams of horses and wagons of the Suhrs, their customers and suppliers would make a U-turn around the building. Part of the area to the east of the building is the area in dispute.

On October 3, 1930, Bertha Suhr and Henry Suhr sold the premises to their two sons, William Suhr and George Suhr, who in turn, sold the premises to defendant John Boza. Subsequently, the various defendants in this action acquired interest in the property, which has

remained with them continuously to the present date.

Plaintiff filed a bill in chancery for an injunction and damages against defendants alleging that it was the record title owner of certain real estate adjoining defendants' real estate; that the southeast corner of defendants' two story building "encroached" upon the bank's real estate about 32 inches on one side and 12 inches on the other; that the eaves of defendants' building "encroached" upon the bank's real estate about 2-1/2 feet; and that the sidewalk along the east side of defendants' building encroached about 3 to 5 feet at a point 52 feet south of the front lot line.

Plaintiff further alleged that it attempted to place a driveway around the west end of its new bank building and that at the westerly line of its property it commenced to build a brick wall separating its property from that of defendants; that when it endeavored to complete the wall where it crossed defendants' sidewalk, along the east side of defendants' building, defendants destroyed the wall; that although defendants were notified of their encroachment upon plaintiff's property, they failed to remove it; that the encroachment makes plaintiff's property less valuable; that such encroachment is a continuing one and unless the encroachment is removed, plaintiff will continue to suffer irreparable injury; that unless an injunction issues restraining defendants from interfering with the construction of the wall, such interference will continue to damage plaintiff irreparably; and that plaintiff has no adequate remedy at law.

In their amended and supplemental answer defendants admitted plaintiff's record title as alleged in plaintiff's complaint but specifically denied that plaintiff is the actual owner, and in possession of all of its record title; denied that all of defendants' real estate lies west of the eastern boundary of defendants' record title, and denied the existence of any encroachment. Defendants then stated that a portion of the real estate owned by them extends east of plaintiff's

westerly record title boundary; that the front portion of defendants' building is over 50 years old; that the rear addition and sidewalk were built over 20 years prior to this suit; that the area covered by the sidewalk was used as a private walk for many years; that plaintiff, in order to erect the driveway on the west side of their building, removed sod and a concrete slab from the real estate owned by defendants; that by means of threats of physical violence, arrest, and the misuse of the village police force, plaintiff forcibly erected a portion of its diagonal concrete curb on defendants' property; that defendants were forced to remove a portion of said curb to re-establish the only means of ingress and egress to the rear entrance of the rear apartment and to the rear yard; that such means of ingress and egress were, and still are, open, notorious, and continuing for a period of more than 20 years prior to the filing of the suit; and that any alleged notice upon defendants was insufficient in law or equity to toll the twenty-year Statute of Limitations.

As an affirmative defense, defendants stated that they are the owners of the real estate in dispute by reason of their having been in actual, open, notorious, adverse, continuous hostile and exclusive possession of the premises far in excess of twenty years.

As a further affirmative defense, defendants stated that the alleged encroachment of the southeast corner of their building and their sidewalk in no way interferes with plaintiff's operations; and that any injunction with respect to defendants' building and sidewalk would be harsh and oppressive in that it would deny ingress and egress to the rear of defendants' building.

Defendants' final affirmative defense stated that plaintiff built a high concrete wall in the rear of the premises, upon land dedicated as a public street which it had no right to do, and therefore, has come into equity without "clean hands."

Defendants filed an amended counterclaim in which they alleged

that in 1902 Bertha and Henry Suhr owned certain real estate both by record title and by adverse possession; that the real estate was improved with a two story frame building with a stairway and porch on the east wall which provided the only means of ingress and egress to the second floor, a frame shed attached to the building, a two story frame barn located at the rear of the premises, and an outhouse located east of the east wall of the barn; that in 1913 Bertha and Henry Suhr replaced the frame barn and outhouse with a two story frame barn approximately 20 feet by 38 feet, which they used for storing chattels and horses, that the area immediately east of the barn was used for parking delivery wagons; that the new barn extended onto the disputed real estate; that from 1902 and continuously up to 1934, the unimproved land to the west of defendants' building, to the east of their building, and immediately south of the building, was used as a"U" shaped driveway by the Suhrs and their successors in business in the store located in defendants' building, that on October 2, 1930, Bertha Suhr and Henry Suhr conveyed said real estate to their sons, G. William Suhr and George E. Suhr, that in 1934 G. William Suhr and George E. Suhr barricaded the "U" shaped driveway to the east of the building with a steel plate which was erected parallel to the south line of the Main Street public sidewalk; that in the spring of 1938, G. William Suhr and George E. Suhr informed John P. Boza that they were the owners of certain land together with the two story frame building, the frame shed attached to the building, the two story frame barn and a strip of land approximately 12 feet wide on the east side of the building and commencing south from the south line of the Main Street public walk and running approximately parallel with the east wall of the frame building and the east wall of the barn in a generally northerly and southerly direction to the north bank of the creek in the rear of the premises, which strip of land was the same strip of land which was used as the

east side of the "U" shaped driveway; that on August 8, 1938, G. William Suhr and George E. Suhr as sellers entered into Articles of Agreement, for a Warrenty Deed, with John Boza providing for installment payments; that on June 25, 1938, John Boza paid $500.00 and took possession of the land, together with all of the improvements thereon and the aforesaid strip referred to hereinabove; that after obtaining possession, defendants removed the steel plate barricade, removed the frame shed attached to the rear wall of the building, excavated the land underneath the building for a basement, dumped all the excavated earth upon the east side of the "U" shaped driveway, removed the inverted V-shaped exterior stairway and porch from the east wall, built a foundation out of concrete blocks underneath a portion of the existing building and also a foundation out of concrete blocks for the then contemplated addition, remodeled the entire front area of the building, built an interior stairway to the second floor front apartment, removed the two story barn in the rear of the building, built a two story addition to the rear of the building containing two additional apartments as well as an enclosed stairway to the second floor rear apartment at the rear of said building, constructed a concrete walk along the east wall of the two story building as enlarged, the southerly end of which walk is allegedly on the land in dispute, and sodded the area to the east of the sidewalk where the driveway used to be; that all of this work was done openly, notoriously and continuously from the date of possession to on or about April 1939; that shortly after April, 1939, the interior of the addition was completed; that on October 10, 1938 the Suhrs conveyed their property to John Boza; that defendants and their predecessors in title have been in actual, open, notorious, hostile, continuous and exclusive possession of all of the land from 1902 to on or about June 1, 1959, the date on which the bank commenced to pave a part of the land and construct a curb at the edge of said pavement, thereby attempting to block ingress and egress to the rear of the premises as well as to the second floor rear apartment.

Defendants prayed that the Court establish fee simple title in them and issue an injunction directing plaintiff to remove the pavement and curb and to refrain from interfering with defendants' full use and peaceful enjoyment of the real estate involved.

Plaintiff filed a reply in the nature of a general denial of the affirmative matter set forth in the amended answer.

The decree confirmed the report and supplemental report of the Master in Chancery and an injunction issued restraining defendants from using any part of the premises in question, except insofar as defendants' building extends on the premises in question and restraining defendants from expanding, or extending their building and its eaves any further over the premises in question. The decree further entered judgment for $100.00 in favor of plaintiff for alleged destruction of a part of the curb; and allowed the Master $4,173.90 for his fees and charges and to be paid equally by plaintiff and defendants. The decree also dismissed the amended counterclaim of defendants, for want of equity.

Defendants' theory of the case is that the evidence adduced at the hearings before the Master in Chancery overwhelmingly supported defendants' position, and that the "Findings of Fact" and "The Recommendations and Conclusions" of the Master in Chancery, incorporated into the decree by the trial judge, are contrary to the manifest weight of the evidence.

Plaintiff's theory of the case is that defendants failed to support their defense and counterclaim of adverse possession by clear, positive and unequivocal evidence.

The essential elements of adverse possession are that the possession be continuous, hostile, actual, notorious, exclusive, and under a claim of ownership or color of title. Cannella v. Doran, 21 Ill.2d 514, 173 N.E.2d 512 (1961). Furthermore, there exists a presumption of law that an adverse possessor's rights in real estate

are subservient to the rights of the record title owners. Superior Oil Company v. Harsh, 126 F.2d 527 (C.A. 7th 1942).

Plaintiff maintains that there was insufficient evidence presented that the particular property was possessed continuously for the statutory period of 20 years; that the claim of defendants was hostile in its inception; that defendants actually possessed all of the property in question; or that defendants occupied the property under color of title.

In support of its contention that defendants did not prove essential elements of adverse possession, clearly and convincingly, plaintiff first maintains that defendants did not prove that they continuously occupied the property in dispute for the statutory period in that defendants by their conduct recognized a superior right in plaintiff and its predecessor. We do not find it necessary to answer this contention as there are other essential elements that defendants failed to prove.

Defendants failed to prove that their possession was hostile in its inception. There was testimony that the Suhrs and defendants walked around the boundary lines and that Mr. Suhr showed or pointed out what he thought were the lot lines that were to be conveyed to the defendants. Where the adverse claimant acquires and possesses real estate, thinking that he is the record title owner, such possession has been held to lack hostility. Wiedrich v. Howard, 7 Ill.2d 589, 594, 131 N.E.2d 508 (1956).

Defendants also failed to prove that there was actual possession of the property in dispute. Defendants attempted to meet the burden of establishing continuous possession by showing that certain activities were engaged in over the statutory period. The evidence presented by defendants only showed that activities took place on various portions of the property for indefinite periods of time. This evidence was insufficient to establish actual possession.

Finally, defendants did not prove they took the land under a claim of ownership or color of title, as the boundaries of the tract were not definitely established at the inception of the statutory period with reasonable certainty. The only evidence in the record regarding the boundaries is testimony that the boundary line was pointed out and walked over by the Suhrs; that a red barn protruded 9 or 10 feet over the line to the east; that wagons were parked at the east end of the barn and that a driveway had been used by customers of the Suhrs and Bozas. William Suhr testified, however, that he could not with any degree of accuracy identify on a photograph in evidence where the line was that he pointed out and walked over with defendants.

Defendants' next contention is that plaintiff did not establish a prima facie case for injunctive relief. Plaintiff, in order to establish a prima facie case, had to show that there was a tort being committed by defendants and that it had an inadequate remedy at law. We feel that the Master was correct in arriving at the conclusion that an encroachment existed and that it was of a continuing nature so that plaintiff had an inadequate remedy at law. We feel that the trial court was correct in finding that plaintiff established a prima facie case.

Defendants' next contention is that plaintiff came into equity with unclean hands, and in support of this contention alleges that plaintiff by improving the parking facilities on the property in dispute, violated a court order that the parties maintain the status quo. We disagree with this contention. The status quo referred to in the order must be taken in light of the circumstances existing at the time the order was entered. At the time the order was entered the defendants had not claimed any rights by virtue of adverse possession. Thus, there was nothing definite in the record to show how plaintiff should maintain the status quo. Defendants also allege that plaintiff came into the trial court with unclean hands in that it attempted to solve its dispute with defendants over the land as a criminal matter. Defendant Walter

Boza appeared before a magistrate as a result of an incident which took place April 1959, when he kicked over a plank being used in the construction of plaintiff's building. He was found not guilty. This criminal matter, however, did not have anything to do with the boundary dispute and is not a basis for the defense of unclean hands.

Finally, defendants contended that the decree works a hardship on them in that they have no access to the rear of their premises. We agree with defendants' position. Their contention is based on a balancing of conveniences doctrine. See Nitterauer v. Pulley, 401 Ill. 494, 505, 82 N.E.2d 643 (1949). Pradelt v. Lewis, 297 Ill. 374, 376 (1921), and cases cited therein. The decree in the lower court specifically found that the rear of defendants' building be allowed to encroach over plaintiff's property for so long a period of time as defendants own the property. We feel that the decree should be modified so that not only defendants' building, but also the sidewalk, on the east side of said building, be allowed to encroach on the property of plaintiff so long as defendants, or each or any of them, own the premises, so that defendants have access to the rear of their premises. Decree modified, and as modified is affirmed.

DECREE AFFIRMED, AS MODIFIED.

BURKE, P.J., and BRYANT, J., concur.

49618

LEMONT NATIONAL BANK, a banking corporation,

Plaintiff-Appellee,

v.

WILLIAM BOZA, WALTER ALEX BOZA, and EDWARD BOZA,

Defendants-Appellants.

(65 I.A.2d 1)

APPEAL FROM THE

SUPERIOR COURT OF

COOK COUNTY

A

as per letter of 1/20/66

ON REHEARING

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT:

The court having considered the Petition for Rehearing, the Answer, the Reply Brief thereto and Additional Abstract of Record and having reconsidered the original briefs and authorities cited, has decided to strike the last Paragraph of the Opinion on page 9 and substitute the following as the last Paragraph on page 9 of the Opinion:

> "Finally, defendants contend that the decree works a hardship on them in that they have no access to the rear of their premises. Their contention is based on a balancing of conveniences doctrine. See Nitterauer v. Pulley, 401 Ill. 494, 505, 82 N.E.2d 643 (1949), and Pradelt v. Lewis, 297 Ill. 374, 376 (1921), and cases cited therein. After a careful examination of the Petition for Rehearing, the Answer, the Reply Briefs and the Additional Abstract of Record (which had been allowed to be filed on motion of the plaintiffs), and a reconsideration of the original briefs and authority therein cited, we conclude that the decree should be and it is affirmed in all respects."

DECREE AFFIRMED.

BRYANT, P.J., and BURKE, J., concur.

To Mimeo June 11

49838

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
KING JAMES HANNON,
Defendant-Appellant.

(65 I.A.2 2)

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY CRIMINAL DIVISION

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

The appellant in this cause was tried by a jury and found guilty of the crime of burglary on February 14, 1964, and after a hearing in mitigation and aggravation was sentenced to 15 to 20 years in the Illinois State Penitentiary. The only point raised by this appeal is that the indictment was defective by reason of the failure to recite the address of the building allegedly burglarized. The appellant cites the case of People v. Williams, 30 Ill.2d 125, 196 N.E.2d 483 (1964) which held that an indictment which charged the defendants with an attempt to break into and enter a factory did not give them sufficient information to prepare a defense in that it did not state the address of the factory. The Court in that case also held that the defect in the indictment could not be helped by a bill of particulars.

In that case, however, the defendants sought to have the indictment quashed in the trial court. In this cause, no question of the sufficiency of the indictment was raised until this appeal was filed. The People cite People v. Bremer, 57 Ill. App.2d 436, 206 N.E.2d 795 (1965), where it was held that the failure to state the address of the allegedly burglarized premises was not a jurisdictional defect in the indictment and that such defect was waived by the defendant proceeding to trial without moving to quash. People v. Starr, 50 Ill. App.2d 399, 200 N.E.2d 118 (1964) and People v. King, 50 Ill. App.2d 421, 200 N.E.2d 411 (1964) are also cited by the People and are in accord with People v. Bremer, supra.

It will be seen then, that there is no conflict between the case cited by the Appellant and those relied on by the People. In People v. Williams, supra, the defect in the indictment was raised at the proper

time, and in the cases cited by the People, the defect was not raised until after the trial. The appellant argues that the point was preserved by an oral motion in arrest of judgment which was made at the conclusion of the trial. This same point was raised in both People v. Bremer, supra, and People v. Starr, supra, and in both those cases it was held that this was not sufficient to raise the question on appeal. We feel that People v. Prohaska, 8 Ill.2d 579, 134 N.E.2d 799 (1956) is not applicable here. In that case the Supreme Court held that an oral motion in arrest of judgment can preserve the question for consideration on appeal where no demand for a written motion is made. The cases cited by The People show that there was no proper ground for arrest of judgment since the appellant waived the defect in the indictment when he proceeded to trial. Thus, there was no proper ground to be preserved on this appeal. The judgment of the Court below is, therefore, affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., and LYONS, J., concur.

49920

65 I.A.2/6

ALBERT W. HEMPEL,

Plaintiff-Appellee and Cross-Appellant,

v.

HENRY KRUEGER, ELEANOR KRUEGER, DAVID KRUEGER and HENRY KRUEGER, As Executor of the Estate of ANNA KRUEGER, Deceased,

Defendants-Appellants and Cross-Appellees,

and

JOSEPH SIEGEL and SONIA SIEGEL,

Defendants and Cross-Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

This action was brought to recover a real estate broker's commission based upon the sale of improved realty in Chicago. The jury returned a verdict for plaintiff in the sum of $30,300 against the sellers and the court directed a verdict for the buyers. The sellers appeal from the judgment entered on the verdict and plaintiff, the broker, cross-appeals from the judgment entered on the directed verdict in favor of the buyers.

Count I of the amended complaint by Albert W. Hempel, the broker, was directed against Henry Krueger, Eleanor Krueger, David Krueger, and Henry Krueger, as executor of the estate of Anna Krueger, deceased and the LaSalle National Bank as trustee, under a land trust, and alleges that these defendants invited plaintiff to procure a purchaser for certain real estate owned by them; that he procured and introduced to defendants, purchasers ready, willing and able to purchase the premises, namely co-defendants Joseph Siegel and Sonia Siegel; that after plaintiff had produced these purchasers, these defendants entered into an agreement with the Siegels on or about August 26, 1960, for sale of the realty and did on September 30, 1960, convey the realty to the Siegels and that the plaintiff, through his efforts, is entitled to a commission.

Count II is directed against the bank as trustee, the Kruegers and the Siegels. This count alleges that these defendants by collusion and conspiracy, for the sole purpose of depriving the plaintiff of his commission, agreed between themselves to the sale of the property for the sum of $600,000, which amount represented the original selling price as quoted by the plaintiff, less the approximate price of commission of the sale which would have been paid to the plaintiff. Defendants denied that plaintiff was invited to procure a purchaser; that plaintiff is entitled to a commission; that he procured a purchaser for the premises, ready, willing and able to make the purchase and further denied the allegations of collusion and conspiracy. The court directed verdicts for all the defendants as to Count II at the close of plaintiff s case and denied a motion by defendants for a directed verdict as to Count I. The defendants offered no evidence and rested on their motion for a directed verdict at the close of all the evidence. The bank as trustee was dismissed from the case by agreement because it held only a naked legal title to the realty.

Plaintiff's theory of the case is that the court properly refused to direct a verdict in behalf of the Kruegers since he proved by competent evidence that he was the broker who procured purchasers ready, willing and able to purchase and was the efficient cause of the purchase. The theory of the Kruegers is that plaintiff was not their agent, that he did not produce buyers ready, willing and able to purchase the real estate; that he was not the procuring cause for the sale of the realty and that the trial judge erred in not directing a verdict in their favor.

For a long time prior to the occurrence of any event upon which this cause of action is based, the Kruegers held a joint beneficial interest in an apartment building containing 98 apartments, located at the southwest corner of 70th Place and Oglesby Avenue, Chicago, one half block from the South Shore Country Club. The legal title was held by the bank. One of the beneficial owners, Anna Krueger, died on July 26,

1960, and her beneficial interest was willed to Henry Krueger and David Krueger. At the time this action was commenced, Henry Krueger was acting as executor of the estate of Anna Krueger, deceased. The apartment building was offered for sale during the years 1959 and 1960. Brochures had been printed and were distributed widely among real estate brokers on the south side of Chicago. The plaintiff is a licensed real estate broker doing business in Chicago. Two of the brochures were admitted in evidence as plaintiff's exhibits #4 and #5. The plaintiff, as an active real estate broker, came into possession of copies of these brochures. The following information appears on these brochures, specifically in plaintiff's exhibit #4. "Real estate brokers recognized. For inspection see manager, Mr. Arthur Richter or Janitor, Mr. Joseph Copp." Their respective addresses and phone numbers also appear. The brochure also states: "If no answer phone Ed Weber WAlbrook 5-6500." This is the telephone number of Lawn Savings and Loan, operated by one of the defendants Henry Krueger. Henry Krueger appeared to be the dominant person among the Krueger family. Joseph Siegel is the son of Sonia Siegel, a widow. She was conversant with real estate transactions. There was evidence that as between her son and herself, she was the dominant person. During the spring of 1960 and the period thereafter, the plaintiff had certain real estate dealings with the Siegels. The Siegels desired him to sell three pieces of property on Maryland Avenue which they owned. On July 30, 1960, he consulted the Siegels about the possible purchase of the Oglesby Avenue apartment building. After speaking with the Siegels, plaintiff phoned Mr. Ed Weber, whose name appeared on the brochure and was advised by Weber that the building was still available and that regular Board commissions would be paid. After obtaining this information, plaintiff arranged to take the Siegels to the premises for a prearranged appointment to view the building with Mr. Richter, the manager of the building. On Saturday, August 13, 1960, plaintiff and the Siegels proceeded to the building and examined the

external portions as well as one boiler room. The following day, August 14, 1960, plaintiff, accompanied by the Siegels, visited the premises with Mr. Richter, the building manager. They looked through a series of vacant as well as occupied apartments. They also looked at the remaining boiler room. At that time plaintiff was informed by the janitor that the rental income listed on the brochure was not in accordance with the actual rentals. After leaving the building the plaintiff drove the Siegels to a movie theater and they informed him that they were interested in purchasing the building. He advised them of the difference in the rentals mentioned by the janitor and stated that he would get a tape from Mr. Weber indicating the actual rental. At the time of the transaction the Lawn Savings and Loan Association was located at 3525 West 63rd Street in Chicago. Mr. Weber was a loan officer at the Savings Association. He was hired by Mrs. Krueger. When plaintiff talked to Mr. Weber, plaintiff requested Mr. Weber to register the name of Mrs. Siegel. At this time plaintiff told Mr. Weber, according to the testimony of Mr. Weber, that plaintiff might have a deal on the Oglesby realty if he could sell three of the Siegel's buildings.

On Tuesday, August 16, 1960, plaintiff went to the Savings Association and asked Mr. Weber for a tape for the actual rentals. Weber told plaintiff that it would take two or three days to run a tape. Three days later, August 19, Weber called plaintiff, who came to Weber's office and obtained the tape of the rentals. Plaintiff then delivered the tape to Joseph Siegel. Two days later, on August 21, plaintiff was advised by Joseph Siegel that the tape checked out OK and was then advised by both of the Siegels that they were making arrangements to get a mortgage so that they could purchase the building. At this time the Siegels owned unencumbered real estate having a value in excess of $400,000 plus cash assets of $40,000. Approximately two or three days after this discussion, on August 22 or 23, plaintiff returned to the

home of the Siegels and was advised by Mrs. Siegel that he did not have an exclusive and, therefore, she did not have to buy the building through him. She opened the door and told him to leave. He left. On August 26, 1960, four days thereafter, a contract for the sale of the real estate was executed by the Siegels and the Kruegers and on September 28, 1960, a deed conveying title to Sonia Siegel and Joseph Siegel was executed and delivered. According to the applicable rates the commission in a transaction of this size would be $30,300. There was evidence that it is the custom and practice in the real estate business in Chicago that the seller pay the commission unless there is an agreement to the contrary. There was evidence that when a brochure of the type introduced with the legend "real estate brokers recognized" that the people who distribute the brochure pay the commission.

The Kruegers, in arguing their position that the court erred in failing to allow their motion for a directed verdict at the close of the evidence, say that when a real estate broker acts as agent of the seller he is entitled to a commission only if he is the procuring cause of the sale and produces a purchaser who is ready, willing and able to purchase. We are called upon to decide whether there is any competent evidence, standing alone, together with all reasonable inferences to be drawn therefrom and taken with intendments most favorable to plaintiff, which tends to prove the material elements of plaintiff's case.

The parties are in agreement that a real estate broker is entitled to a commission from the seller if he procures a buyer ready, willing and able to purchase the property and is the efficient cause of the purchase. In our statement of the facts we have considered only the evidence favorable to the plaintiff together with all reasonable inferences to be drawn therefrom. After inspecting the building Mrs. Siegel told plaintiff that if she and her son could buy the building for $700,000 they would take it. Plaintiff says that he told Weber that the Siegels would purchase the premises for $700,000. Weber did not think

that the sale price was specifically mentioned. He (Weber) said that he had no authority to quote any sale price for the property. Weber's testimony was to the effect that when plaintiff came to his office after the inspection of the premises plaintiff told him (Weber) that plaintiff might have a deal if he could sell three of Mrs. Siegel's buildings. Plaintiff's version of the conversation differs in that he did not tell Weber that a deal by Mrs. Siegel would depend on plaintiff's success in selling the Siegel properties.

We think that there was evidence from which the jury could determine that plaintiff was the broker for the seller. There was evidence that the legend on the brochure that real estate brokers would be recognized is regarded as an offer to pay a commission to a broker who procures a buyer for the property listed in the brochure. The plaintiff informed Weber of the name of his intended purchaser. According to plaintiff's testimony Weber said plaintiff would be entitled to a commission if he succeeded in making a sale. The position of the Kruegers that plaintiff was acting as agent or broker for the Siegels presents a factual issue which was decided by the jury adversely to the Kruegers. The statement by Mrs. Siegel when she premptorily dismissed plaintiff--he did not have an exclusive on the building--indicates that she did not consider plaintiff to be her broker. We do not think that there was any impropriety in the action of plaintiff in inquiring as to any discrepancy in the rentals. It is the duty of the broker to honestly negotiate between the parties on behalf of the person whom he represents. Although the Siegels were aware of the existence of the building prior to being contacted by plaintiff, they did not previously inspect the building nor indicate any desire to purchase it. It was only through the efforts of plaintiff in contacting the persons listed on the brochure, arranging an appointment to inspect the building, twice bringing the purchasers to the premises for the inspection of the apartments and heating facilities, that anyone indicated an interest

in purchasing the building. Mr. Richter, the building manager, indicates that from January 1959, up until the time when plaintiff interested the Siegels in the purchase of the building, he was not contacted by any real estate broker to show a prospective purchaser through the building; and during that period he was the building manager and his name was listed on the brochure as the person to contact for such purpose. Although the brochure had been distributed widely among real estate brokers and businessmen on the south side of Chicago, not once did any broker other than plaintiff produce interested parties who came to the premises by appointment and inspect the premises for the purpose of making a purchase. The jury, in effect, found that plaintiff procured for the Kruegers, buyers in the persons of the Siegels who were ready, willing and able to purchase the property and who did purchase the property and that plaintiff was the efficient cause of the purchase.

According to the testimony of the plaintiff and corroborated by Weber and Richter, on Sunday August 14th, plaintiff took the Siegels on the property for the purpose of inspection. Two days later, August 16th, plaintiff requested from Mr. Weber, the tape of the actual rentals. He was given the tape on August 19th. He brought it to the Siegels. On August 21, the plaintiff was informed by the Siegels that the tape checked out and that they were in the process of obtaining the financing. During the following week, on August 22 or 23, the plaintiff was advised by the Siegels that they would not purchase the property through him and they ordered him from their home. During this period of time the Siegels owned property free and clear which had a value in excess of $400,000, in addition to cash assets of $40,000. The ability and readiness of the Siegels to purchase at the time is shown by the fact that four days later, on August 26, 1960, they entered into a contract to purchase the property with the Kruegers. The jury

had ample evidence from which to find that plaintiff was the efficient and procuring cause of the purchase by the Siegels. The defendants, both the Kruegers and the Siegels, deprived the plaintiff of an opportunity to produce a written contract. They are not in a position to take advantage of their misconduct.

In Chicago Title and Trust Co. v. Guild, 329 Ill. App. 374, Mr. Justice Bristow, in speaking for the court, said, 381:

> "Where an agent is employed to sell real estate for the owner or undertakes the employment and is instrumental in bringing the owner and the buyer together, and the owner then concludes the sale at a less price than the agent was authorized to sell the agent is entitled to compensation for his services."

We turn to a consideration of the cross-appeal of plaintiff from the judgment on the directed verdict on the issues of the second count in favor of all the defendants and against the plaintiff. This is the conspiracy count. We agree with the position of the attorney for the Siegels that there is insufficient evidence to prove the elements of the charge of conspiracy stated in the second count. The Kruegers are not in a position to claim prejudice in the trial because of their joinder with the Siegels, as there was no move by them for a severance.

The judgment on the first count for $30,300 in favor of plaintiff and against the Kruegers is affirmed and the judgment on the second count in favor of all the defendants and against the plaintiff is affirmed.

JUDGMENTS AFFIRMED.

BRYANT, J., and LYONS, J., concur.

49908

(65 I.A.2 87)

MARJORIE E. OLSON, Plaintiff-Appellant, v. WILLIAM HOFFMAN, GERRIT HOFFMAN and ALBERT KOLB, Defendants-Appellees.	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, COUNTY DEPARTMENT, LAW DIVISION.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment on the pleadings entered upon motion of the defendants. Plaintiff sued for personal injuries sustained in January, 1959, which she alleged were due to a defective hook in the basement of a building in which she had leased an apartment. The issue involved is the application of an exculpatory clause in the lease executed before the passage of legislation prohibiting enforcement of such clauses.

The building in question was owned by defendants, one half interest in Albert Kolb and the other half in William Hoffman and his wife, Gerrit Hoffman, in joint tenancy. Plaintiff had lived there for several years with her husband and upon his death in 1958 she signed a one-year lease with a provision for termination after sixty days' notice. The lease was signed by defendant William Hoffman as lessor. It was in a standard form prepared by the Chicago Real Estate Board and an exculpatory clause exempted the lessor from liability for damages to person or property including "all claims arising from the building or any part thereof being or becoming out of repair including appurtenances, equipment, furnishings, fixtures or apparatus located in the demised premises or in the building or premises of which said demised premises are a part, or from any act or neglect of Lessor...."

A jury demand was filed, but the parties stipulated that the court without a jury should hear the evidence and determine whether the exculpatory clause barred the action. After hearing evidence and argument on this issue, the trial court found that the clause was a bar to the action and entered judgment accordingly.

In April, 1959, a statute was enacted declaring that exculpatory clauses in private real estate leases are void as against public policy and wholly unenforceable. Ill. Rev. Stat., ch. 80, § 15a (1963). It has been held that the statute does not apply to leases executed before its enactment, Booth v. Cebula, 25 Ill. App. 2d 411, 166 N.E.2d 618, and this interpretation is not challenged here. Thus the case is governed by the law as it stood prior to the act. The validity of exculpatory clauses in apartment leases was upheld in O'Callaghan v. Waller & Beckwith Realty Co., 15 Ill. 2d 436, 439-440, 155 N.E.2d 545. The court rejected the argument that disparity in bargaining power between landlords and tenants made enforcement of such clauses unconscionable, stressing that "The relationship of landlord and tenant does not have the monopolistic characteristics that have characterized some other relations with respect to which exculpatory clauses have been held invalid. There are literally thousands of landlords who are in competition with one another." Furthermore, said the court, "No attempt was made upon the trial to show that Mrs. O'Callaghan was at all concerned about the exculpatory clause, that she tried to negotiate with the defendant about its modification or elimination, or that she made any effort to rent an apartment elsewhere."

In the instant case, plaintiff presented evidence that she and her son, a real estate accountant, failed in their efforts to

find adequate housing elsewhere at lower cost. The son testified that at the time in question the Chicago area was undergoing a shortage of housing. On the other hand, one of the defendants testified that he observed "For rent" signs all around the neighborhood. Plaintiff admitted discontinuing the search after signing the lease, although her tenancy was subject to termination on sixty days' notice. Significantly when the lessors had insisted on a written one-year lease, plaintiff bargained for and obtained the termination clause, but made no attempt to modify or eliminate the exculpatory clause. Examining the record, the court below failed to find in the social position or relationship of the parties anything that would support a finding that the clause is unenforceable. Nor are we able to do so.

Plaintiff argues that the clause if valid does not apply to injuries in the basement area. In Moss v. Hunding, 27 Ill. App. 2d 189, 169 N.E.2d 396, we held that a similar clause did not bar an action for injuries suffered by a tenant while she was an invitee in the separate apartment of a fellow tenant. The governing consideration was that although injuries anywhere within the building were covered by the words of the clause, the plaintiff was not injured in her status as a lessee but as an implied invitee of the lessor. Plaintiff in effect urges that we decide as a matter of law that she was in the basement as an invitee of the lessors rather than as a tenant in exercise of rights under the lease. Whether use of particular areas apart from the demised premises is an appurtenance to the leasehold is primarily a question of fact. Patterson v. Graham, 140 Ill. 531, 535, 30 N.E. 460; Fuchs v. Koropp, 151 Ill. App. 612; 51 C.J.S. Landlord and Tenant § 293 (1947). The parties waived a

jury and submitted evidence for a determination of the separate issue of the effect of the clause, and the court after considering Moss v. Hunding, supra, found that "there is no question but that the exculpatory clause here covers the area in question." Implicit in the finding must have been the conclusion of the court that the plaintiff was in the basement in the exercise of her rights under the lease rather than as an invitee of the landlord. The finding is not against the manifest weight of the evidence.

The plaintiff argues that exculpatory or indemnification clauses which are ambiguous are subject to strict construction when active negligence is involved. Cairnes v. Hillman Drug Co., 108 So. 362 (Ala. 1926); cf. Westinghouse Elec. Elevator Co. v. LaSalle Monroe Bldg. Corp., 395 Ill. 429, 70 N.E.2d 604. In the instant case there is no ambiguity as to this aspect of the exculpatory clause. It applies to injuries resulting not only from passive negligence or disrepair but from "any act or neglect" of the lessor.

Plaintiff also contends that the clause does not protect the defendants Gerrit Hoffman and Albert Kolb since they did not sign the lease. Our law is clear that a non-signing owner may receive protection from an exculpatory clause if he is sued in his capacity as lessor. Booth v. Cebula, 25 Ill. App. 2d 411, 418, 166 N.E.2d 618; Menge v. Liberty Natl. Bank, 36 Ill. App. 2d 61, 183 N.E.2d 567. To distinguish these cases, the plaintiff relies on Koehler v. Southmoor Bank & Trust Co., 40 Ill. App. 2d 195, 189 N.E.2d 22, where beneficiaries of a land trust were sued for injuries to a tenant using trust property of which they had possession and control but no legal or equitable interest in the title. The case against the beneficiaries was based on their

possession and control. The lease, which they did not sign, contained an exculpatory clause, similar to that here, protecting "Lessor and Lessor's agents." This court held that the beneficiaries were not protected by the clause since they were not lessors or agents within its intendment. Here it is uncontested that all three defendants own the legal interest in the real estate and are being sued in their respective capacities as lessors. Indeed Albert Kolb's name appears on the face of the lease and he testified that William Hoffman ordinarily signed the leases. The elaborate mechanisms of secrecy found in the land trust cases are here wholly absent. See Koehler v. Southmoor Bank & Trust Co., supra, at 199.

The judgment is affirmed.

Judgment affirmed.

Dempsey, P.J., and Sullivan, J., concur.

Abstract only.

A

50020

(65 I.A.2 88)

VIRGINIA VAN CURA, HELEN DONNA OTT, and GEORGE BLOZIS, Executor under the Last Will and Testament of PAULINE DRANGELIS, Deceased, Plaintiffs-Counter Defendants, Appellees, v. KAZYS DRANGELIS, Defendant-Counter Plaintiff, Appellant.	Appeal from the Circuit Court of Cook County.

MR. PRESIDING JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a declaratory judgment which construed an antenuptial agreement against the defendant Kazys Drangelis.

In 1950, a day before their marriage, Drangelis and Pauline Paukstis entered into an agreement concerning Mrs. Paukstis' property. In 1952 Pauline Paukstis Drangelis signed a will leaving her real and personal property to the plaintiffs Virginia Van Cura and Helen Ott, the daughters of her first marriage. Pauline Paukstis Drangelis died in 1961 and a dispute arose between her husband and the daughters concerning their respective interests in her property. The daughters and the executor of their mother's will thereupon filed a suit for declaratory judgment seeking a settlement of the controversy and the construction of the antenuptial agreement.

At the time of the agreement Mrs. Paukstis owned and resided in a two-story building at 2642 West 63rd Street, Chicago. She also had an interest in a building containing a tavern and an apartment at 4171 South Halsted Street, Chicago. After the marriage she and the defendant lived in the 63rd Street building. Her will devised this property to her daughter

Virginia. In March 1952 she and her daughter Helen, as joint tenants, leased the Halsted Street building for a term of 36 years. Her interest in the Halsted Street property was devised to Helen. Drangelis' defense to the declaratory judgment action was on the principal ground that the agreement (in which he specifically waived whatever rights he might acquire in Pauline Paukstis' personal property and in the Halsted Street property) did not include a waiver of interest in her 63rd Street property.

After various pleadings had been filed the plaintiffs moved for summary judgment. Their motion was granted and the judgment was entered. Drangelis appealed and this court reversed the judgment and remanded the cause. Van Cura v. Drangelis, 43 Ill. App. 2d 205, 193 N.E.2d 201.

In our prior opinion we noted that the antenuptial agreement (which is set out in full in the opinion) was ambiguous and required extrinsic evidence to ascertain its true intent. The agreement provided that Drangelis waived his rights to all personal property; that Pauline Paukstis retained all the property she possessed, the same as if she had not married, and that Drangelis waived all interest he might acquire through marriage. We stated that although the agreement stressed personal property, the reference to all property and the waiver of all interest which might be acquired by marriage, weakened the emphasis and strongly suggested that the agreement was not meant to be restricted to personalty. We observed that the nature of Pauline Paukstis' interest in the Halsted Street property was unknown to us; that the record was not clear whether this interest was in personal property, a chattel-real, or in real property, and that learning what this interest was might throw light on whether the agreement was meant to apply to

personal property only or to personal and real property. We remanded for further proof, if such was available and if the parties desired to present it.

When the case was tried after remandment the plaintiffs introduced evidence showing that at the time the prenuptial agreement was executed Pauline Paukstis' interest in the Halsted Street property was that of a lessee under a long term leasehold, that she had improved the premises with a building and that the lease provided she had the privilege of removing the building during the final 60 days of the lease. They also introduced the testimony of several witnesses, including the defendant's brother and sister-in-law, who heard Drangelis say to his stepdaughter Helen Ott, at the wedding dinner following his marriage to her mother, that he had assigned all rights, property and assets to Pauline, his wife.

At the conclusion of all the evidence the chancellor found that the interest of Pauline Paukstis in the Halsted Street property was a chattel-real and constituted real estate at the time the antenuptial agreement was executed; that the provisions in the agreement were applicable to her real estate as well as her personal property and that by the valid and enforceable agreement Drangelis had waived dower and all other right and interest in both her personal and real property. A decree was entered which held that upon the death of Pauline Drangelis her daughters became the owners of her entire estate.

The defendant contends again in this appeal that the antenuptial agreement did not include the 63rd Street property. He further contends that the trial court erred in construing the agreement to include this property, that the admission of parol

evidence and other extrinsic evidence to aid in the interpretation of the agreement was improper and that the court, during the course of the trial, disregarded the rules of practice and procedure.

We find no merit in any of these contentions. A contract which is subject to more than one interpretation may be explained by extrinsic evidence so that the true intention of the parties may be learned. Des Plaines Motor Sales, Inc., v. Whetzal, 58 Ill. App. 2d 143, 206 N.E.2d 806. In our prior opinion we found that the agreement in dispute was ambiguous and that it required extrinsic or parol evidence as an aid to its complete understanding. We directed the trial court to hear such evidence if it was produced by the parties, and it would have been error had the court not done so. Where a case is reversed and remanded the questions of law decided in that case by the Appellate Court are binding on the trial court. Curran v. Harris Trust and Savings Bank, 13 Ill. App. 2d 430, 142 N.E.2d 183.

The principles of construction which govern contracts are equally applicable to antenuptial agreements. The property rights of a spouse acquired through marriage will not be taken away by an antenuptial agreement unless the intention to relinquish these rights is clearly apparent. The additional proof offered by the plaintiffs was properly received in evidence and by it all doubt as to the meaning of the agreement and the intention of the parties was resolved. The chancellor's construction of the agreement will not be disturbed.

We further find that no error was committed by the court in regard to the rules of practice or the procedure of the trial.

The decree of the Circuit Court is affirmed.

Affirmed.

Sullivan and Schwartz, JJ., concur.

Abstract only.

Abstract

89

Abs

A

NO. 64-141 - NO. 64-142

65 I.A.2 89

FILED

NOV 22 1965

HOWARD K. KELLETT
Clerk Appellate Court Second District

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

HOWARD H. MEYERS and MARY K. MEYERS, Plaintiffs-Appellees, vs. ROBERT VINCENT and ELLEN VINCENT, Defendants-Appellants.	)	Appeal from Circuit Court of the 17th Judicial Circuit, Winnebago County.

MR. JUSTICE MORAN delivered the opinion of the Court.

The present cases involve the same questions of law and fact and have been consolidated in this Court for hearing. Involved is a certiorari proceeding to test the validity of a forcible entry and detainer proceeding had in Justice Court. The trial judge granted a motion to quash the writ of certiorari and this appeal followed. The errors raised by the defendants are either nonexistent or have been waived and it is our judgment that the decision of the trial court should be affirmed.

In April of 1961 the plaintiffs entered into a contract to sell certain premises in the City of Rockford to the defendants. The defendants were to make payments of $100.00 per month commencing May 1, 1961. By November, 1962, nineteen monthly payments had fallen due, but the defendants had only paid $953.00. In addition, the defendants had failed to pay the 1961 real estate taxes as required of them by the agreement. Plaintiffs served notice of intention to cancel the agreement and after the expiration of more than thirty days, plaintiffs served a notice of cancellation and a demand for immediate possession. Still the defendants failed to pay and finally in January, 1963, the plaintiffs filed a complaint for forcible entry and detainer in a Justice Court in Winnebago County. Summons was issued and personally served upon the defendants. Subsequently, the defendants filed a general appearance by an attorney representing them at that time. The defendants failed to appear for trial and an order was entered dispossessing the defendants and restoring possession to the plaintiffs. A writ of restitution was then issued and personally served upon the defendants. Thereupon the defendants initiated a Petition for Writ of Certiorari in the former County Court of Winnebago County. The writ was issued the same day and a transcript of the Justice Court proceedings certified to the County Court.

The plaintiffs filed an affidavit made by the former attorney for the defendants. A motion to strike this affidavit was denied. In the oral argument before this Court the plaintiffs' attorney stipulated that we should not consider the affidavit. Our decision is reached without any consideration of the affidavit and, therefore, we do not rule on the propriety of the trial court's decision on the motion to strike.

Subsequently, the trial court denied the defendant's motion to dismiss the original action in forcible entry and detainer and granted a motion of the

plaintiffs to quash the Writ of Certiorari and to order the justice of the peace to proceed with the original action. The propriety of this order is before us today.

The defendants contend that the Justice Court proceedings were null and void because the complaint was not signed by the plaintiffsand the summons and writ of restitution were not signed by the justice of the peace. The fact is that the summons and writ of restitution contain the rubber stamp facsimile signature of the justice of the peace and both were personally served upon the defendants. The defendants filed a general appearance in the Justice Court and thereupon waived their right to raise these questions. Counsel does not suggest how the defendants could possibly be prejudiced by the fact that the justice of the peace stamped his name rather than signing it. Indeed it is hard to imagine any detriment. Be that as it may, the filing of a general appearance lays the question at rest.

The defendants next contend that the trial court should have held a trial de novo in the certiorari proceedings. Unfortunately, this was not counsel's position in the trial court. In a motion to strike filed in the trial court, counsel said, "On certiorari the review is confined to questions disclosed by the record relating to the jurisdiction of the inferior court or tribunal,or the proper exercise of such jurisdiction." Counsel persisted in his theory and in the same pleading said, "In ascertaining whether or not the inferior court or tribunal had jurisdiction and proceeded regularly in making the determination complained of, the reviewing court is confined to the consideration of the record returned in obedience to the writ,by which the error, if any, must appear."

Dissatisfaction with the result obtained on one theory does not authorize counsel to switch theories in this Court. Having insisted that he was not entitled to a trial de novo in the trial court precludes counsel from seeking it in this Court. Counsel cannot create error in trial and then rely on it on appeal.

Lastly, the defendant contends that the transcript filed by the justice of the peace is inadequate. "Where the record is incomplete, a reviewing court will indulge every reasonable presumption in favor of a judgment or order. Any doubt arising from the incompleteness of the record will be resolved against the appellant." McGann v Lurie, 15 Ill. App. 2d 297, 300 (1957).

We conclude that the trial court was correct and the judgment is therefore affirmed.

JUDGMENT AFFIRMED

Abrahamson, P. J., and Davis, J., concur.

50052

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	APPEAL FROM
vs.	CIRCUIT COURT
EDWARD LEE LYONS, Defendant-Appellant.	COOK COUNTY CRIMINAL DIVISION.

MR. PRESIDING JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

The defendant, Edward Lee Lyons, was charged with the crime of armed robbery. Found guilty in a bench trial and sentenced to a term of imprisonment of four to ten years in the State Penitentiary, he appeals from that finding and prays that the judgment of the trial court be reversed on the basis that he was not proved guilty beyond a reasonable doubt.

The facts of the robbery are not in dispute. The only question is whether or not the People sustained the burden of proving that Lyons was a participant in that crime.

On June 15, 1963, at about 6:00 p.m., two men wielding nickel-plated revolvers robbed the Regal Shoe Store, 6341 South Halsted Street, Chicago. They held Anthony Shafala and Gus Golvostis (manager and assistant manager of the store) at gunpoint and took two pairs of size 12 shoes, two pairs of size 10-1/2 shoes, 20 to 30 pairs of socks, two transistor radios, and approximately $220.00 in cash, including $60.00 from Golvostis and $30.00 from Shafala. The robbers moved around the store in full sight of the victims, addressed several remarks to them, and questioned them several times to find out if there was a safe on the premises. Neither robber wore any apparent mask or disguise, and the victims had the opportunity of observing the features, manners, and voices of the criminals for half an hour, according to the testimony. The robbers fled after shutting the two victims in a bathroom. There were no other known witnesses to the crime.

Gus Golvostis, one of the complaining witnesses, testified to the above story. He further testified that he had never seen the defendant before the time of the robbery, and that about three to five days after the holdup he and Shafala went to the police station and viewed some two thousand "mug shots" before seeing a picture which caught their attention. At that point Golvostis said, "I believe that this is one of the men." The attending police officer asked, "Aren't you positive?" The witness replied, "On the side view picture I am positive, but on the face picture I am not . . . [b]ecause the man there in this picture, here, has got glasses on. At the holdup there was no glasses involved." The glasses in the picture were dark-rimmed, with normal rather than very thick lenses.

On Sunday morning, June 30, 1963, fifteen days after the robbery, the police called Golvostis and told him to come down to the police station to see if he could identify any of the men the police were holding. Five men, including the defendant, were in the lineup; they were of the same race, but possibly of different sizes. The defendant was not wearing glasses. The police did not indicate which man in the lineup was the suspect, but during a 15- to 30-minute period they asked each man in the lineup to state his name, address, and the reason he thought he was there. The witness testified: "This defendant was standing in the lineup in the middle . . . The officer never said a word to me, sir, about any defendant standing in the middle . . . ." It should be noted that the witness heard the voice of the accused when the men gave their names and addresses. He recalled that the robbers had been in his store for "a good half hour." The defendant had asked for the size 12 shoes; his partner had asked for the smaller size. Neither robber specified width.

The other complaining witness, Shafala, testified at the trial. He denied that the police had indicated the defendant as one of the men standing in the lineup on June 30, 1963. He recalled that he had made a tentative identification on June 18, at the police station, from a photograph which had the defendant's name and brief history. The witness barely recalled that the history had mentioned something about a former conviction. On cross-examination the witness testified that the police had only asked him to come down to view a lineup but had not told him that they had caught the man who held up the store.

The defense presented one witness—Officer James Wright—who testified that he was assigned to investigate the robbery and had received a note a few days after the crime advising that the victims had tentatively identified Lyons as one of the robbers. On June 27 or 28 Officer Wright obtained a different picture of the defendant from the Bureau of Identification, included it with a variety of pictures and went to the shoe store. Shafala was present and he picked out the picture of the defendant. The picture did not show Lyons wearing glasses and was different from the picture Shafala had originally seen when he viewed photographs on June 18. Golvostis arrived later and he, too, selected the picture of the defendant from the other photographs. Officer Wright then returned to the police station and later arrested the defendant. Officer Wright did not find a gun, any new shoes or socks at the defendant's apartment.

The defendant testified in his own behalf. He had been paroled while serving a term for armed robbery and had left the penitentiary in December of 1963 [sic]. He denied being in the vicinity of 63rd and Halsted Streets in Chicago on the day of the crime. He stated that he had not held up the shoe store and that he had never seen the two complaining witnesses prior to June 30, 1963. He further testified that he did not own a nickel-plated revolver and did not have a

revolver in his possession on the day of the crime. He stated that he was in the Checker Cleaners at 63rd and Wentworth—about 18 blocks away from the scene of the crime—at 6:00 p.m. on June 15; that he had not played cards that day but had played checkers; that he had been visiting with a girl there and had been in and out of the cleaners and the barber shop next door from 3:00 to 7:00 p.m. on the afternoon of the crime. He remembered that one of the men who had been in the barber shop was a Mr. Wyatt and another was Otis, the barber. There had been two barbers there and several men who came in and out of the shop that afternoon. He testified that he wore size 13-B shoes and could not wear size 12. After he was taken to the police station he was placed in a lockup, then into a lineup which was held in the lockup, "not like a regular lineup." The two complaining witnesses then came in together and viewed the men in the lineup. The witness testified that this was the first time he had ever seen either of them. The police asked him his name and address and his opinion as to why he was there. He replied that he did not know. He turned around two or three times in the lineup, and the complaining witness came up and touched him on the back of the shoulder.

Officer Wright was recalled to the stand on behalf of the People and testified that when he asked the defendant what he was doing at the time of the robbery he replied he had been playing cards in the barber shop. Officer Wright further testified he had not told the defendant to remove his glasses in the lineup.

The defendant cites People v. McPheron, 354 Ill. 381, 188 N.E. 470, to support his theory that he was adjudged guilty solely on the identification of two eyewitnesses, that there was no other corroborating evidence in the record, and that this is insufficient to sustain the burden of proving him guilty beyond a reasonable doubt.

He cites People v. Sanders, 357 Ill. 610, 192 N.E. 697, which case holds that where a witness is told in advance of the identification that the guilty party is in the custody of the police, and the prisoner is produced alone for the purpose of identification, the weight of evidence as to identification is impaired. He also cites People v. Gooden, 403 Ill. 455, 86 N.E.2d 198, and People v. Gold, 361 Ill. 23, 196 N.E. 729, to support the view that a witness who has viewed the image of a defendant's face in a photograph might be subsequently influenced by what he remembers from the photo, and that the witness should have no reasonable doubt as to the correctness of his identification.

In the cases the defendant cites, the convictions were set aside for either of two reasons: 1) Other evidence raised a reasonable doubt as to the defendant's guilt: People v. McPheron, supra, where the defendant brought in 12 witnesses, 11 of whom testified that the defendant was 14 miles away from the scene of the crime at the time the crime was committed; People v. Ricili, 400 Ill. 309, 79 N.E.2d 509, where the criminal drove a car and where several defense witnesses testified that the defendant did not ever drive or know how to drive a car; People v. Gooden, supra, where five witnesses corroborated defendant's alibi that he was sick in bed on the day of the crime; and People v. Gold, supra, where several defense witnesses supported defendant's alibi. In the instant case we have only the defendant's uncorroborated alibi testimony. 2) There was little or no opportunity for the witness to observe the accused: People v. Gold, supra, where the eyewitnesses had only a fleeting look at the criminal; People v. Sanders, supra, where eyewitnesses to the crime said one co-defendant was not one of the holdup men, and the co-defendant was identified while alone, almost three years after the crime, and no testimony was given as to any identification

of his voice, mannerisms, scars, injuries or clothing, and where the witnesses contradicted each other; People v. Grizzel, 382 Ill. 11, 46 N.E.2d 78, where there were no eyewitnesses since the complaining witness could not see his attackers, where the People's witnesses at no time identified the defendants as being directly connected with the crime, and where there was only weak circumstantial evidence to link defendants with the crime. In the instant case the two eyewitnesses had the opportunity of observing the defendants for a half hour. The criminals wore no masks nor any disguises, and they talked at considerable length. Defendant Lyons was identified in a relatively short time after the robbery, both on the basis of his facial characteristics and his voice, and was identified by both eyewitnesses from separate pictures at separate times, as well as in the lineup.

The evidence of the defendant is not of the quantity or quality as that in the Supreme Court cases cited by him. The trial court found that the evidence of the defendant did not support his alibi. The defendant argues that the failure of the police to find any of the stolen items or the gun in his room, plus the fact that the defendant wears a shoe larger than those stolen, are facts which are sufficient to raise a reasonable doubt. The trial court considered those factors and found the defendant was guilty.

On the basis of the record and the law, we cannot say that the defendant was not proved guilty beyond a reasonable doubt. The judgment of the Criminal Division of the Circuit Court of Cook County is affirmed.

AFFIRMED.

DRUCKER, J., and ENGLISH, J., concur.

Publish abstract only.

(151)

A

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

65 I.A.2/151

General No. 10626 Agenda No. 10

Owen F. Carter,
Plaintiff-Appellee

vs.

Montgomery Ward & Co., Incorporated,
Defendant-Appellant

Appeal from
Circuit Court
Vermilion County

TRAPP, J.

This is an appeal from a judgment of the Circuit Court of Vermilion County, Illinois, in favor of the plaintiff, in the amount of $1,650.00. The suit, heard before a jury, was for personal injury resulting from a fall received by plaintiff in the defendant's store occasioned by plaintiff's stepping upon a drill bit on the floor near the hardware counter.

Defendant asserts as error, (1) the failure of the trial court to direct a verdict in its favor, (2) alternatively, the failure to declare a mistrial, (3) the failure to grant a new trial upon consideration of the weight of the evidence and (4) erroneous rulings in giving and refusing instructions.

As to the first alleged error, defendant says that with respect to the presence of the drill bit on the floor, there is no evidence that defendant knew, or should have known that it was there, or that the defendant caused it to be upon the floor.

Since almost every statement of fact made by plaintiff was disputed by the defendant, and since defendant contends alternatively that the verdict is against the manifest weight of the evidence, it is necessary to review the evidence.

Plaintiff, a 63 year old man, testified that he went to defendant's store on November 9, 1961, about 10:30 A. M., to purchase an electric switch. He purchased it from a tall blond young male clerk who was working with a pasteboard box at the hardware department. Merchandise is displayed on counters in compartments separated by glass dividers. Plaintiff made his purchase and turned past the hardware counter when he stepped on a drill bit $\frac{1}{4}$ inch to $\frac{1}{2}$ inch in diameter and 6 or 7 inches long, slipped and fell on his back. Another customer by the name of Wallis came over from the paint department and helped plaintiff to his feet. The young clerk asked him if he took a pretty good fall and if he hurt himself. Plaintiff said he didn't know.

The plaintiff did not see any customers other than Mr. Wallis in the store basement where he fell. He only saw Ruby Wischer, head of the sports department, and the young clerk. Plaintiff was not absolutely sure the day he fell was November 9th, but it was the last of the week, probably Thursday or Friday. Plaintiff was not sure of what the young clerk was doing with the pasteboard box he had been working with before he sold plaintiff the electric switch. He did testify, however, that the clerk was at the hardware department first with the pasteboard box, then came over to the electric department to sell him the switch and then went back to the hardware department. The aisle in which plaintiff fell was along the hardware counter. Metal drill bits were on display for sale in the hardware department on November 9, 1961. The young clerk picked up the drill bit after the accident and put it on the counter.

Mr. George Wallis testified that he was in defendant's store on the morning of November 9, 1961, at the paint department. There were no clerks there and he was walking around. He saw the plaintiff fall and was about 15 feet from him when he fell. When he saw plaintiff fall, he heard a noise and the drill bit plaintiff stepped on went over and and hit the counter and bounced off. He saw the drill bit on the floor and saw the clerk pick it up. Mr. Wallis testified that the clerk had a cardboard box and he was taking

merchandise out of the box and putting it in bins on the counter. From the time Mr. Wallis got in the basement until the fall, he saw only one clerk and saw no customers besides plaintiff and himself. After the clerk picked up the drill bit he went back to what he was doing, taking things out of the carton and putting them on the hardware counter.

A Mr. Harold Yeazel, sales manager, testified that only he and a Mr. Howell, operating manager, ever replenished the bins and he was not doing it that day. While Mr. Yeazel first excluded the possibility of a young man of the description given by plaintiff and Mr. Wallis, it became apparent on cross-examination that his recollection was imperfect.

The reported cases of injury from falling on the floor in a store are myriad. See 61 A.L.R.2nd 6. The rules involved, however difficult of application, are simple. The premises must be kept in a reasonably safe condition for business invitees, but the occupier of the premises is not an insurer of the safety of the visitors. In addition to the presence of the obstacle, substance, or debris on the floor, there must be some evidence that defendant was responsible for its presence, or that the article or object had been present for a sufficient length of time that defendant should know it was present. Addition-

ally, the usual rule with regard to contributory negligence would be applicable.

Defendant, in support of its motions for directed verdict, for judgment notwithstanding the verdict and for new trial, relied upon six cases. In Jones v. Kroger Grocery and Baking Co., 273 Ill. App. 183, 186, where a small piece of spinach on a well lighted and otherwise clean floor caused plaintiff to fall, the court found there was no basis for finding negligence based solely on the presence of this small amount of spinach. In Dietz v. Belleville Co-op Grain Co., 273 Ill. App. 164, the court found that the presence of a piece of sheet iron 2 feet long, 2 inches wide and 1/16th of an inch thick did not create a dangerous condition in a parking lot. In Schmelzel v. Kroger Grocery and Baking Co., 342 Ill. App. 501 on 506; 96 N. E.2d 885, the court found that the presence of a small vegetable leaf on a well lighted and otherwise clean floor did not establish negligence. In Antibus v. W. T. Grant Co., 297 Ill. App. 363, where plaintiff slipped on a banana peel on a stairway of a general merchandise store, the court directed a verdict for defendant because there was no proof as to defendant's knowledge of the presence of the peel. In Olinger v. Great Atlantic and Pacific Tea Co., 21 Ill. 2d 469; 173 N. E.2d 443, the court found that the presence of a sweet sticky substance on the floor was not properly

related to products sold by defendant even though it was established that defendant sold a cough medicine, which was a sweet sticky substance, at a counter near this place. In Wroblewski v. Hillman's, Inc., 43 Ill. App.2d 246, 248-49; 193 N. E.2d 470, where a customer slipped on a vegetable leaf near the checkout counter, it was held, in the absence of evidence that it was dropped by defendant's servants, that a verdict should have been directed.

We are of the opinion that the present case comes within the rule given in Donoho v. O'Connell's, Inc., 13 Ill.2d 113, at 122; 148 N. E.2d 434, cited with approval in Olinger v. Great Atlantic and Pacific Tea Co., 21 Ill. 2d 469 at 475-76; 173 N. E.2d 443:

> "Where, however, in addition to the fact that the substance on the floor was a product sold or related to defendant's operations, the plaintiff offers some further evidence, direct or circumstantial, however slight, such as the location of the substance or the business practices of the defendant, from which it could be inferred that it was more likely that defendant or his servants, rather than a customer, dropped the substance on the premises, courts have generally allowed the negligence issue to go to the jury without requiring defendant's knowledge or constructive notice."

Here, a drill bit, which was a product sold by defendant, was on the floor next to the hardware counter where such bits were displayed in open bins, and, at a counter where there is some evidence that a clerk was replenishing the

hardware bins, on an occasion where only two clerks were in the basement and only two customers, neither of which customers had previously been near the bins. This would constitute sufficient circumstantial evidence from which a jury might properly conclude that the article was dropped by defendant's servant and, perhaps, that it should have been noticed by defendant's servant if he didn't drop it.

A drill bit is a dangerous item to have underfoot and it is not necessarily so obvious that plaintiff would be charged with negligence in failing to see it.

In none of the cases cited by the defendant was the product found on the floor identified as a product sold by defendant at a counter near where it was found, at a time when a clerk was replenishing stock, and at a time when neither customers nor other clerks were in the area where the object was found.

We think the trial court acted properly in submitting the issues to the jury. We are of the further opinion that the verdict was not against the manifest weight of the evidence.

The defendant complains of the voir dire examination of one juror who was excused because the prospective juror stated she had had an unpleasant experience with the defendant. There is no record of the questions and answers and no sufficient showing of possible prejudice,

for this court to say that the trial court erred in refusing to grant a mistrial. Additionally, the court gave defendant's counsel an opportunity to question the remaining jurors as to whether the excused juror's remarks would influence them.

The defendant complains of the refusal of defendant's Instruction No. 14, which advised the jury that if it decided in favor of the defendant on liability, it would not be necessary to consider the question of damages. The court did instruct the jury orally that it must first determine whether or not there is liability and, if it decided that issue in the affirmative, it should fix the damages according to the evidence. We think the defendant was entitled to have all of the instructions given in writing. Ill. Rev. Stat. (1961), chap. 110, §67. We believe, however, that plaintiff's given Instruction No. 8-a informed the jury that determination of damages was conditioned upon deciding in favor of the plaintiff on the question of liability. Also, although the court should not instruct orally, the instruction was upon the line requested by the defendant and was not, therefore, reversible error upon the sole ground that it was given orally.

Defendant objects to plaintiff's given Instruction No. 11 upon the ground that there was no evidence that other persons may have placed the substance on the floor, and no

evidence as to how the substance got on the floor of defendant's premises, and no evidence that the substance was on the floor a sufficient length of time that it should have been discovered. The portion of the instruction covered by these objections is in the following language:

> "Also, the Plaintiff has the burden of proving by a preponderance or greater weight of the evidence one or more, but not all, of the following propositions:
>
> "1. that the substance was placed on the floor of Defendant's premises by the negligence of the Defendant or its employees.
>
> "2. that the substance was placed on the floor of Defendant's premises by other persons and the Defendant knew of its presence or that the substance was on the floor a sufficient length of time that it should have been discovered.
>
> "3. that there is no proof how the substance got on the floor of the Defendant's premises and the Defendant knew of its presence or that the substance was on the floor a sufficient length of time that it should have been discovered.
>
> " If you find from your consideration of all of the evidence that the Plaintiff has fulfilled his burden of proof, then your verdict should be for the Plaintiff, but if, on the other hand, you find from your consideration of all of the evidence that Plaintiff has not fulfilled his burden of proof, then your verdict should be for the Defendant."

We think there was a proper evidentiary basis for the instruction. Here we are dealing with an object on the floor next to a place where a clerk was working and no persons were in the store other than plaintiff and one other customer

who was some distance away. The time within which one might be required to discover the object under these circumstances could be a very short time compared to the time that should be given a store owner to discover an object in a parking lot, or compared to the time to be given where the store was crowded. We think this was within the area of proper jury determination.

While there is an obvious objection to the last paragraph of this instruction in that it was directory and omitted the elements of due care and proximate cause, no specific objection was made upon these grounds and these elements were, in fact, supplied by defendant's given Instruction No. 3.

The judgment of the circuit court will be affirmed.

AFFIRMED.

SMITH, P.J. and CRAVEN, J. concur.

50095

65 I.A.2 152

IN RE PETITION TO ANNEX CERTAIN UNINCORPORATED TERRITORY TO THE VILLAGE OF ARLINGTON HEIGHTS, ILLINOIS.	APPEAL FROM THE
ALBERT M. VIDMAR, BARBARA VIDMAR, DAVID A. BURKE, EVELYN R. BURKE, ALAN D. SELLS and LINDA A. SELLS, Petitioners-Appellants,	CIRCUIT COURT OF COOK COUNTY,
v.	COUNTY DIVISION.
THE VILLAGE OF ARLINGTON HEIGHTS, a Municipal Corporation, L. A. HANSON, Village Manager of the Village of ARLINGTON HEIGHTS, and JOHN G. WOODS, Village President of the Village of Arlington Heights, Respondents-Appellees.	

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the circuit court of Cook County, County Division, sustaining the motions of the respondents to strike the petitions of petitioners Albert and Barbara Vidmar and David and Evelyn Burke, wherein they requested the court to vacate its order of June 20, 1963, authorizing the annexation of the territory described in said order to the village of Arlington Heights. This is also an appeal from the order of court granting the motion of respondents to deny the motion of petitioners Vidmars and Burkes to file an amended petition, and also granting respondents' motion to strike the petition of Alan and Linda Sells. The petitioners have also appealed from the orders which refused to vacate the order of June 20, 1963, and grant an injunction restraining the village of Arlington Heights from completing the annexation proceedings of the territory described in said order.

On April 3, 1963, a petition was filed requesting that territory described therein be annexed to Arlington Heights. A motion to dismiss the proceedings for annexation was filed

on June 3, 1963, by Pine Homes, Inc., not a party to this appeal, setting forth that the petition for annexation did not conform with statutory requirements. An order was entered on June 20, 1963, authorizing the annexation and stating that Pine Homes, Inc. should receive certain concessions in consideration for the withdrawal of its motion to dismiss the annexation proceeding. That order recited that the petition conforms to the statute and that the legal notices under the statute were published and served as required, and among other things set forth the following:

> "4. Land owned by Pine Homes, Inc., which is included and described in the Annexation Petition now pending in the County Court of Cook County, under Case No. 63-Co-1839, shall be handled in the following manner:
>
> (a) Pine Homes, Inc. shall consent to the entry of a Decree in the Annexation Proceedings, and withdraw its Motion to dismiss said proceedings;
>
> (b) In consideration for consenting to the entry of the Annexation Decree, and withdrawing its Motion to dismiss said proceedings, the Village of Arlington Heights shall:
>
> (1) Issue a building permit for each lot owned by Pine Homes, Inc.
> (2) Charge the same fee for each building permit, as that charged for similar permits by the County of Cook.
> (3) Permit single family homes to be built on each of said lots, having the same building specifications as the specifications allowed by Cook County.
> (4) To consider these lots for all building purposes to be subject to the same zoning provisions as those lots now under the jurisdiction of the County of Cook.
> (4) Enter its appearance in the pending Annexation case, and include all of the Agreements between the parties in said Decree.
> (6) Include the provisions of said Decree in the Ordinance to be passed by the Village of Arlington Heights, ratifying and approving this Annexation."

The order was approved by all parties through their attorneys of record. The village of Arlington Heights, although not a party to the proceedings, filed its appearance through its attorney and approved said order.

Pine Homes, Inc. in its motion to dismiss the proceedings for annexation filed on June 3, 1963, among other things, sets forth the following:

> "3. Section 7-1-4 of the Illinois Municipal Code (Illinois Revised Statutes, 1961, Chapter 24, Section 7-1-4), dealing with annexation of territory, provides:
>
> 'All Petitions shall be supported by an affidavit of one or more of the petitioners, or someone on their behalf, that the signatures on the petition represent a majority of the property owners of record and the owners of record of more than 50% of land in the territory described, and a majority of the electors of the territory therein described.'
>
> Thus, the requirement of the statute is that the affidavit must show the existence of the following three facts:
>
> (1) That the petitioners constitute a majority of the record owners; (2) That the petitioners constitute owners of more than 50% of the land; and (3) That the petitioners constitute a majority of the electors of the territory sought to be annexed.
>
> 4. The affidavit which is attached to the petition for annexation merely shows two of the three statutory requirements, namely: (1) that petitioners are more than 50% of the owners, and (2) that petitioners are more than 50% of the electors of the territory.
>
> 5. Paragraph 5 of the petition for annexation in the above entitled proceeding alleges that 'This petition has been signed by the owners of record of more than 50% of the land in such territory,' that said allegation is, in fact, untrue, and there is no affidavit in support of said allegation."

The order entered on June 20, 1963, by the then county court of Cook County, making concessions to Pine Homes, Inc., which, incidentally, were not enjoyed by other land owners in the village of Arlington Heights, was the result of the foregoing objections filed by Pine Homes, Inc.

Albert and Barbara Vidmar, more than a year after the entry of that order, filed their petition on July 6, 1964, under section 72 of the Practice Act (Ill. Rev. Stat. 1963, chap. 110, sec. 72). At the time of filing their petition the village of Arlington

Heights had not yet passed its ordinance annexing the property described in the order of June 20, 1963, however, a meeting of the trustees of the village of Arlington Heights had been publicized to be held on the evening of July 6, 1964, for the purpose of passing an ordinance to annex said property. The petition of Albert and Barbara Vidmar attacked the petition and affidavit for annexation upon the same grounds that Pine Homes, Inc. had attacked the petition. In addition to that point, which questions the jurisdiction of the court, numerous other reasons were assigned in support of the petition to vacate the order of July 6, 1964.

The petition of David and Evelyn Burke, which was filed on July 17, 1964, likewise raised the point that the court lacked jurisdiction and asked that the annexation ordinance of July 6, 1964, be declared null and void. This is likewise true of the petition filed by Alan and Linda Sells on August 17, 1964.

The trustees of the village of Arlington Heights adopted an ordinance at its meeting held on the evening of July 6, 1964, annexing the territory described in the annexation petition.

On August 4, 1964, the court dismissed the petitions of the Burkes ~~and the~~ Vidmars upon motion of the village. On August 14, 1964, the Burkes and the Vidmars filed a notice of motion for leave to file amended petitions. On September 2, 1964, the court denied permission to the Burkes and the Vidmars to file their amended petition and struck the petition of the Sells.

There is no question but that the affidavit attached to the petition for annexation did not conform to the statute. (Ill. Rev. Stat. 1961, chap. 24, sec. 7-1-4.) The petitioners

herein urged that because of this failure the court did not have jurisdiction to enter its order of June 20, 1963. It is also urged that the county court in annexation proceedings derives its authority from the legislature and that statutes providing for annexation must be strictly followed to confer jurisdiction on the court.

The affidavit attached to the original petition for annexation recited the following: "That more than fifty-one (51%) per cent of the owners of record of lands within said legally described territory and electors residing within said territory have indicated their assent to annexation by signing the Petition for annexation." However, the statute (Ill. Rev. Stat. 1961, chap. 24, sec. 7-1-4) requires an affidavit of one or more of the petitioners that the signatures on the petition represent (a) a majority of the property owners of record; (b) the owners of record of more than 50% of the land in the territory described, and (c) a majority of the electors of the territory therein described. The affidavit in the instant case did not contain one of the requirements, namely, that the petition contain the signatures of the owners of record of more than 50% of the land in the territory described.

In In Re Annexation of Territory in Kankakee County, 30 Ill. App. 2d 391, 398, the court said: "In the instant case the original petition on its face fully complied with the requirements of Sect. 7-2 and was prima facie evidence of such requirement pursuant to Sect. 7-4. With this, jurisdiction was lodged in the County Court to determine, upon a hearing, the validity of the petition." Sections 7-2 and 7-4 therein mentioned were the same as section 7-1-2 and section 7-1-4 under the present statute.

The finding by the court that it has jurisdiction and that

the statute had been complied with is not conclusive, and where the record shows that the county court did not have jurisdiction of the subject matter in a drainage case its attempted judgment or order is a nullity. People v. Swearingen, 273 Ill. 630; Soldier Creek Drainage and Sanitary District v. Illinois Central Railroad Company, 323 Ill. 350.

There was no right at common law to have property annexed to a municipality, L. J. Scheuer et al. v. Johns-Manville Products Corporation, et al., 330 Ill. App. 250, and therefore the statute must be implicitly followed in order to confer jurisdiction upon the court in an annexation proceeding.

The Supreme Court also held in the case of Ward v. Sampson, 395 Ill. 353, that where the court exceeds its jurisdiction and the judgment transcends the statute conferring jurisdiction on the court, the judgment is void and may be set aside after time for appeal has expired.

While the petitioners have raised a serious question as to the jurisdiction of the county court to enter the original order of annexation, under the facts in this case we feel that the trial court properly denied the petitions and properly refused to grant leave to file amended petitions. The petitioners here waited until more than a year after the order of annexation. The order of annexation was entered on June 20, 1963, and the first petition to vacate was filed on July 6, 1964. The village of Arlington Heights, however, also waited until July 6, 1964, before it adopted an ordinance to annex the territory described in the order of June 20, 1963. The petitions filed by the petitioners herein were under section 72 of the Practice Act (Ill. Rev. Stat. 1963, chap. 110, sec. 72), and subsection 4 of that section provides as follows: "The

filing of a petition under this section does not affect the order, judgment or decree, or suspend its operation." Since the filing of the petitions did not suspend the operation or the effectiveness of that order, and since the annexation by the village of Arlington Heights had been completed long prior to a decision by the trial court, we are of the opinion that petitioners' only remedy is by quo warranto.

The petitioners cite the case of Ziebell v. Village of Posen, 257 Ill. App. 32, in support of their contention that the court had a right to enjoin the annexation of property. In connection with the petitions filed under section 72 of the Practice Act the petitioners sought to enjoin the annexation. However, in that case the bill for injunction had been filed before the annexation was complete and before the control of the area had been taken by the village. In the instant case the annexation ordinance was passed on the same day the Vidmars' petition was filed. This was the first petition to be filed. The others were filed later. The annexation had become complete before the court ruled on any of the petitions. The record before us is silent as to what transpired in the court on July 6, 1964, when the Vidmars' petition was filed and there is nothing in the record to indicate that the Vidmars sought a temporary injunction on July 6, 1964, to restrain the passage of the annexation ordinance on that day. By the time the court ruled upon the petitions the village had control of the area and was exercising at least de facto jurisdiction over the same. Under these conditions, where the annexation has been completed, the proper remedy is quo warranto, and not by petition under section 72 of the Practice

Act or injunction. Graves Motors Co. v. Commissioners of the Green River Special Drainage District, 6 Ill. 2d 445; People v. McKinnie, 277 Ill. 342; People v. York, 247 Ill. 591; Ogle v. City of Belleville, 238 Ill. 389; People ex rel. McCarthy v. Firek, 5 Ill. 2d 317.

The petitions, heretofore mentioned, to set aside the order of annexation, were filed under section 72 of the Practice Act, and are filed in the same proceeding in which the order, judgment or decree was entered. However, they are not a continuation of that proceeding. (Ill. Rev. Stat. 1963, chap. 110, sec. 72(2).) In People v. York, 247 Ill. 591, the Supreme Court held that the legality of proceedings by which additional territory is added to a municipality cannot be inquired into except upon a direct proceeding by quo warranto, and will not be determined upon a bill in equity or by objections to a tax which has been levied by the municipality upon the property in such added territory. The court then cited numerous cases in support of the foregoing statement. The question whether the area has been legally annexed can only be tried in a proceeding by quo warranto in the name of the people in which a judgment will be conclusive and binding upon all. People v. McKinnie, 277 Ill. 342.

The Supreme Court in Graves Motor Co. v. Commissioners of the Green River Special Drainage District, 6 Ill. 2d 445, in disposing of an objection to a dismissal of a suit in equity on the grounds that the remedy at law, quo warranto, is not adequate since a court may in its discretion refuse permission to institute a quo warranto action, said on page 448:

> "As to the second point, it would, of course, be manifestly unjust to dismiss plaintiff's complaint in equity on the ground that an adequate remedy exists

> at law by quo warranto to test the merits of the objection, and then refuse permission to file a quo warranto action for that purpose. Hence for a court to deny the plaintiff the opportunity to file a quo warranto suit in order to object to the validity of the organization of the Green River district for the reason alleged, would amount to an abuse of the discretion lodged with that court. Cf. People ex rel. Raster v. Healy, 230 Ill. 280, 288-9, People ex rel. McCarthy v. Firek, 5 Ill. 2d 317, 320-1."

Since quo warranto is the proper proceeding under the circumstances in this case the orders of the trial court are affirmed.

Affirmed.

Dempsey, P.J., and Schwartz, J., concur.

Abstract only.

50368

65 I.A.2/153

JOHN J. WEISS, JR.,	)	
	)	
Claimant-Appellee,	)	APPEAL FROM THE
	)	
v.	)	CIRCUIT COURT OF
	)	
ALBERTA E. EHRLICH, Executor of the Last Will and Testament of Benjamin H. Ehrlich, Deceased,	)	COOK COUNTY.
	)	
Executor-Appellant.	)	

MR. PRESIDING JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

John J. Weiss, Jr., filed a claim for $2,500.00 in the Probate Division of the Circuit Court against the estate of Benjamin H. Ehrlich. The claim was based on a check given to Ehrlich, an attorney at law, as an advance against legal services to be performed; if no services were rendered the amount of the check, less reasonable expenses, was to be returned to Weiss. The estate contended that the check was a retainer to keep Ehrlich, his partners and associates from representing Mrs. Weiss should she seek their services. The executor of the estate appeals from the order allowing the claim and argues that the court erred in ruling on matters of law and evidence and that the judgment is against the manifest weight of the evidence.

Weiss had some marital difficulties and he discussed these with his friend, attorney Herman Silverstein. Silverstein suggested that he see Ehrlich who was a member of a firm specializing in matrimonial law. On May 1, 1962, Weiss and Silverstein had a 15 or 20 minute conversation with Ehrlich and with Aaron Cohn, another member of the firm. While there is a dispute as to what took place, it appears that Weiss indicated he was contemplating a divorce but that he and his wife were living together and he had not made up his mind

whether to proceed. He was advised that neither he nor his wife had grounds for divorce or separate maintenance.

Weiss and Silverstein met with Ehrlich again on May 8th. At that time Ehrlich gave Weiss a blank check and requested that it be made payable to his firm, Ehrlich and Cohn. Weiss filled in the check and signed it. It was for $2,500.00 and Weiss wrote on the back of it, at the very top, "for services to be rendered." He testified that he did this because he wasn't sure he wanted to go through with his contemplated divorce and that he did not, at that time, intend to retain Ehrlich or his firm. He further testified that the word "retainer" was never mentioned; that it was he, not his wife, who was thinking of a divorce, and that no services were rendered because the very next day his marital trouble was resolved. He requested repayment of the $2,500.00 but it was not returned.

A different version of the conversations was presented by attorney Cohn. He said that Weiss was worried because his wife had been talking about separate maintenance and had made inquiries about hiring the firm of Ehrlich and Cohn; that Weiss wished to take the firm "off the market" and wanted to be sure that Ehrlich would represent him. He was informed that they would want a retainer of $2,500.00 for themselves and Silverstein, who was to be associated with them in the case, and that Weiss replied that he did not know whether he would proceed but that he would let them know.

Cohn further testified, contrary to what Weiss had said, that he and Stanton Ehrlich, another member of the firm, were present at the second conference. According to Cohn, Weiss and his wife had separated that morning and notes were made of their

family situation. Benjamin Ehrlich then asked Weiss for the retainer. Ehrlich furnished the blank check and Weiss wrote it out. Cohn said he had no recollection of the notation Weiss wrote on the back of the check. He said they did not hear from Weiss again until sometime in June.

Stanton Ehrlich testified he was present part of the time at the meeting on May 8th. He said the check was a retainer to keep the lawyers in their firm from being available to Mrs. Weiss in the event she wanted to hire them; that the exact words used were keeping the firm "off the market." He added that if there were additional service "it would cover some thousands."

The executor's first point on appeal is that the court was in error "in maintaining that a law firm, once retained, would be required to do more than remove itself from the market...and be willing to render future services to its client." Cited in support of this point are three cases which hold that by accepting a retainer fee a lawyer deprives himself of the opportunity of being employed by the adverse party and is thereby entitled to retain the fee whether or not he performs further services for his client: Blackman v. Webb, 38 Kan. 668 (1888); Union Surety and Guaranty Co. v. Tenney, 200 Ill. 349 (1902) and Blair v. Columbia Fireproofing Co., 191 Mass. 333 (1906). It is unnecessary to discuss these cases or the principle of law involved because the executor's point is based on a false premise. The trial court did not hold against the estate for the reason given by the executor. The trial court made a determination of fact not of law. The court allowed Weiss' claim because the court believed his version of the agreement with Ehrlich, supported as it was by the check itself with the endorsement thereon: "for services to be rendered."

The court found this evidence insurmountable. The court termed the check a conditional payment for services to be rendered and said it was the only concrete, undisputed evidence in the case. The court accepted Weiss' testimony that there was a chance of litigation between himself and his wife and that the services to be rendered were legal services in connection with possible divorce proceedings. If the court had found that the payment was a retainer for the purpose of taking the firm "off the market" and had then refused to sustain the payment because the lawyers had rendered no other service, there would be some foundation for the executor's point. As there is, there is none, for the court rejected the testimony and argument in behalf of the executor.

Attorneys Cohn and Stanton Ehrlich participated in the argument that followed their testimony. During the argument there was a deviation from their position that the sole obligation the firm had was declining employment by Mrs. Weiss. Ehrlich twice lent support to the court's view that the services agreed upon were not so limited. At one time he said "One of the services was not to represent his wife...." At another time, in response to the court's inquiry as to what services were to be performed, he replied "To defend him if she sued."

The executor's next point also rests on a false premise. It is claimed that the court erred in not permitting Stanton Ehrlich to testify that he refused to accept employment offered by Mrs. Weiss. The executor suffered no harm by the exclusion of Ehrlich's testimony because the testimony sought to be elicited was already in the record. Attorney Cohn had been asked "What services had been rendered by Ehrlich?" and had

answered "Refusing to take the case of the lady." A motion was made to strike the answer but the court permitted it to stand. Again he was asked, and this time there was no objection, "What services were rendered by Mr. Ehrlich or Mr. Cohn after the date of the check, if any?" He replied "Refusal to take on the case of Mrs. Weiss when she appeared at our office."

Another alleged evidentiary error was the court's refusal to receive in evidence two letters written by attorney Silverstein to Benjamin Ehrlich at the latter's request. The letters were dated September 24, 1962, and April 26, 1963. The argument is made that the door was opened for the reception of the letters by a question asked Cohn on cross-examination and that the letters, otherwise inadmissible, became admissible because of this question. The question was whether Silverstein talked with Benjamin Ehrlich about returning the $2,500.00 to Weiss. Cohn answered in the affirmative and the subject was dropped. On redirect examination the defense pursued the subject and offered the letters ostensibly to prove that Ehrlich had heard from Silverstein. Both letters were self-serving, contained hearsay information, gave Silverstein's account of the events leading up to the consultations with Ehrlich, what had taken place at those meetings and what Ehrlich had told him about Mrs. Weiss subsequently coming to the firm's office. Silverstein did not testify in person and no evidence deposition from him was submitted. No question was asked or information educed by the claimant that tended to make the letters admissible in evidence. At most they might have been admissible for the very limited purpose of proving their receipt—if their receipt was in dispute, which it was not. One simple question had been asked and answered.

The estate resurrected the subject and tried to use the question as a means of introducing the contents of the letters. The court properly excluded them.

The executor attempted to prove by the testimony of attorney Cohn that shortly after the check was received one-half of the amount was paid over to attorney Silverstein. The theory of the executor is that the testimony should have been admitted because it showed the interpretation the firm placed on the agreement with Weiss; that the prompt division of the check with Silverstein was proof that the lawyers regarded it as a retainer to take their firm off the market, for if it had been for future legal services they would not have split it until the services were performed. The court excluded the testimony for the stated reason that Weiss could not be bound by what was done out of his presence and beyond his control or by what the lawyers did among themselves. The court commented that, in view of the testimony about the agreement, it would be immaterial to draw any conclusion from the action of the attorneys. In the opinion of the court there was no ambiguity in the agreement of the parties that required interpretation, and we find no substantial error in the court's ruling. Moreover, the evidence was double-edged; inferences unfavorable to the attorneys could be drawn from it and its value to the estate was dubious. Splitting fees not "based upon a division of services or responsibility assumed" is of questionable propriety. Why Silverstein should have received half of the fee for keeping the firm of Ehrlich and Cohn from representing Mrs. Weiss was unexplained. If Weiss had reason for such a bargain with the firm, he had none insofar as his

friend Silverstein was concerned.

The finding of the trial court that the evidence showed that no retainer was intended and that the services contemplated by the agreement were not performed for the claimant was not against the manifest weight of the evidence and will not be disturbed. The notation on the check just above the endorsement of the firm was "for services to be rendered" not "to take the firm off the market." To read into the notation the meaning "for services to be rendered by taking this law firm off the market" would be drawing an unreasonable inference from the words actually used. To do so would be altering the natural meaning of the words employed in a written instrument. The firm accepted the check subject to the notation and must be bound by the condition set forth in the notation.

Weiss' claim was for $2,500.00 less the reasonable value of Ehrlich's services. The court stated that the claim would be allowed subject to those services. After some discussion as to what the services were and the amount of time spent talking with Weiss, attorney Cohn said the reasonable value feature would be waived, that Weiss was entitled to his full claim or to nothing. Accordingly, the court entered judgment for the full amount. The judgment will be affirmed.

Affirmed.

Sullivan and Schwartz, JJ., concur.

Abstract only.

50337

(65 I.A.2154)

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, vs. JAMES STINSON, Plaintiff in Error.	WRIT OF ERROR TO CIRCUIT COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

At a bench trial in the Criminal Division of the Circuit Court of Cook County the defendant, James Stinson, was found guilty of the rape of Alberta Anderson, and his punishment fixed at imprisonment in the penitentiary for a term of not less than eight nor more than nine years. Motions for a finding of not guilty, for new trial, and in arrest of judgment were denied. Defendant brings a writ of error, claiming the evidence was not sufficient to establish his guilt beyond a reasonable doubt.

The complaining witness testified that she had gone to an apartment occupied by a person whom she identified as "Bill," and that she left his apartment at 3:00 a.m. to go home. Sitting in the hallway on a garbage can was the defendant. He got up, took the light bulb out of the socket, put a knife to her chin, knocked her to the floor, put the knife to her stomach, pulled up her dress and cut her girdle, then raped her. She had screamed for help but he told her he would kill her if she didn't shut up. She was cut on the chin and stomach, and bleeding a lot.

Two police officers testified that they heard the screams of the complaining witness; that they came into the building and the defendant at that time was still on top of the complaining witness. (This testimony corresponds to that of the complaining witness.) The police officers further testified that she was cut and bleeding, and that the defendant had a knife which he threw out the window. It was afterwards recovered by the police and introduced in evidence. The officers identified the defendant at the trial, and the prosecution introduced the blood-stained clothes of the complainant and

the shirt of the defendant, which was also blood-stained, together with the knife which was used at the time of the complained-of incident.

The defendant and a friend of his (J. W. Wade) both testified. Wade stated that he had met the complainant in a tavern; that she had agreed to come to his room and have intercourse with him for $5.00; that he gave her the $5.00; and that when she left he heard no screaming outside his apartment. (All of this was denied by the complaining witness.) The defendant testified that he had gone to Wade's apartment with the intention of gambling; that no one answered the bell; that when he was starting to leave he saw the complaining witness; that he spoke to her and she offered to have sexual relations with him for $5.00, and he gave her $4.00; that he asked her to get on the floor and she refused, then finally agreed; that when she refused to take her girdle off he cut the girdle. He said, "I cut her girdle. That was so I could do what I wanted." He further testified that afterwards she started to run and got cut with the knife. He denied that he was on top of her when the police came, and stated that he cut her on the chin by accident. He admitted on recross examination that he was on his knees when the police came and that he told the police he had found the complaining witness bleeding, and he was trying to help her.

The defendant relies entirely upon the argument that the evidence in the record was not sufficient to justify a finding of the court that the defendant was guilty; or, in other words, that there was a reasonable doubt of the defendant's guilt. In support of that contention the defendant cites People v. Tate, 26 Ill. 2d 588, 188 N.E.2d 9; People v. Rossililli, 24 Ill. 2d 341, 181 N.E.2d 114; and People v. Szybeko, 24 Ill. 2d 335, 181 N.E.2d 176. The facts in these cases are so far from the facts in the instant case that they are not applicable.

It is a well recognized rule of law that where a case is tried without a jury it is the function of the trial judge to determine the credibility of the witnesses and the weight to be afforded their testimony, and when the evidence is merely conflicting, a reviewing court will not substitute its judgment for that of the trier of the facts. People v. Clark, 30 Ill. 2d 216, 195 N.E.2d 631; People v. Johnson, 47 Ill. App. 2d 441, 198 N.E.2d 173; and People v. Cobb, 52 Ill. App. 2d 332, 202 N.E.2d 56.

In his argument in the brief filed in this court the defendant said:

> "The defendant contends that although the uncorroborated testimony of a prosecuting witness in a case of rape is sufficient to warrant conviction therefore [sic]; there must be clear and unquestionable evidence surrounding such testimony to warrant such conviction where the defendant denies the charge."

In the instant case the testimony of the complaining witness was clear and convincing as to what occurred. The identification of the defendant was incontrovertible. She testified that she resisted; and both she and the two police officers testified that the police were attracted by her screams. The two officers further testified that when they arrived the defendant was in a compromising position from which they could infer that he had had sexual intercourse with the complainant as she had testified. In other words, the testimony of the police officers corroborated the testimony of the complaining witness. The defendant's admissions as to his use of the knife and as to his conduct with the complaining witness were not testimony of such character as could cause the court to draw any other inference than the one which it drew.

The judgment of the Criminal Division of the Circuit Court of Cook County is affirmed.

AFFIRMED.

English, J., and Drucker, J., concur.

Publish abstract only.

50596

65 I.A.2 154

BERTHA SANDERS,	)	
	)	
Plaintiff-Appellee,	)	APPEAL FROM THE
	)	
vs.	)	CIRCUIT COURT OF
	)	
ALONZO SANDERS,	)	COOK COUNTY.
	)	
Defendant-Appellant.	)	

MR. JUSTICE ENGLISH DELIVERED THE OPINION OF THE COURT.

This case comes up for consideration on plaintiff-appellee's motion to dismiss the appeal.

The appeal had previously been dismissed for want of prosecution on September 1, 1965. Briefs and abstracts of appellant had not at that time been filed and were overdue 39 days under the provisions of this court's Rule 5(2)(m). Because of circumstances surrounding the death of a co-counsel for appellant, the dismissal was vacated and the appeal reinstated on September 24, 1965. At the same time appellant's motion by original counsel of record to extend the time to October 10 for the filing of his briefs and abstracts was allowed. They have not been filed.

To appellee's motion to dismiss, the countersuggestion filed by appellant's original first-named co-counsel was to the effect that he had not been paid for his services rendered up to that time, and therefore wished to withdraw. This is not an adequate excuse for failure to comply with the rules of this court.

Appellee's motion is allowed, and the appeal is dismissed.

APPEAL DISMISSED.

McCORMICK, P.J., and DRUCKER, J., concur.

Publish abstract only.

50495

(65 I.A.2 208)

PEOPLE OF THE STATE OF ILLINOIS ex rel. CAROL GARCIA,	)	
Plaintiff-Appellant,	)	APPEAL FROM
v.	)	CIRCUIT COURT,
STANLEY GARRISON,	)	COOK COUNTY.
Defendant-Appellee.	)	

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This is a paternity action. On September 16, 1958, the defendant was found guilty of being the father of a child born out of wedlock. Six years later, on December 8, 1964, on petition of defendant, the trial court entered an order, the effect of which was to find the defendant not guilty of paternity of the same child. The State appeals. Defendant has filed no brief.

The record indicates no attempt by court action to enforce the terms of the paternity order of September 16, 1958, until August 17, 1964, when an arrest warrant for the offense of paternity was issued and served on defendant. On December 8, 1964, after a hearing and consideration of defendant's petition, the trial court found defendant not guilty and ordered the defendant discharged.

The verified petition of defendant states that on September 16, 1958, he was ordered to pay $15 per week for the support of a female child born to Carol Garcia on August 5, 1956; that he was not represented by counsel and was not advised of his rights and liabilities in the matter; that he was not permitted to cross-examine "the complaining witness, was not advised of his right to a trial by jury, and was not permitted to offer rebuttal testimony other than his own statement that he had not had sexual relations with the complaining witness"; that defendant has never paid anything to the complaining witness, as required of him by the order of September 16, 1958, and

"in the instant case the complaining witness has neglected or omitted to assert an alleged right for a period in excess of six years. The female child in question is now in excess of eight years of age. The defendant has, in the intervening years, substantially altered his position. He has acquired a family, and is actively engaged in their support and care. * * * Your petitioner respectfully submits that this alleged right asserted so many years after its alleged creation has been barred by the doctrine of laches."

The petition requested the court "to dismiss the complaint heretofore filed and to discharge the defendant from any and all further liabilities herein." After questioning the complaining witness as to her marital and "A.D.C." status, the court remarked, "Defendant is discharged. * * * Go to A.D.C. and tell them to raise your monthly allowance." The order entered of record found "the defendant is not guilty of the offense charged in the complaint herein and it is ordered by the court that said defendant be discharged and go hence without day."

The petition of defendant, if meritorious, seeks relief provided for in section 72 of the Civil Practice Act (Ill. Rev. Stat., Ch. 110). As such, it is an action civil in nature and appealable by the State. People v. Green, 355 Ill. 468, 473, 189 N.E. 500 (1934).

Considering this record and the allegations of defendant's petition, we conclude that it is without merit and not timely. We do not believe that section 72 was intended to permit a court to enter an order which rendered null and void a previous final and appealable order, without the petition for relief alleging facts sufficient to show that the petitioner's request for relief was obtainable under the provisions of section 72. Laches is no basis

for relief in this case, and defendant's other contentions were inherent in the original proceedings and available for determination by the trial court at the time of the entry of the order of September 16, 1958, or by a proper appeal. (Calabrese v. Hatlen Heights Sewer & Water Co., Inc., 61 Ill. App.2d 434, 209 N.E.2d 855 (1965).) Also, see People v. Saunders, 22 Ill. App.2d 175, 159 N.E.2d 499 (1959), for a similar factual situation.

As to timeliness, section 72 provides that "the petition must be filed not later than 2 years after the entry of the order, judgment or decree." Defendant's petition does not show any legal disability, duress or fraudulent concealment and, therefore, his petition comes too late.

For the reasons given, the order of December 8, 1964, is declared to be null and void and is hereby reversed and set aside.

REVERSED.

BURMAN, P.J., and KLUCZYNSKI, J., concur.
Abstract only.

NO. 65-12

65 I.A.2 284

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

WILLIAM J. WAGNER, Plaintiff-Appellant, vs. MICHAEL DAVID, DAVID BUILDING COR- PORATION, an Illinois Corporation, and HOME BUILDING AND LOAN ASSOCIATION, an Illinois Corporation, Defendants-Appellees.	)	Appeals from the Circuit Court of the Sixteenth Judicial Circuit, Kane County, Illinois
AND		
WILLIAM J. WAGNER, Plaintiff-Appellant, vs. MICHAEL DAVID and DAVID BUILDING CORPORATION, an Illinois Corporation, Defendants-Appellees.	)	

ABRAHAMSON, P. J.

This appeal is prosecuted from an order of the Circuit Court of Kane County dated September 4, 1964, denying the right of foreclosure in each of two cases, which had previously been consolidated; sustaining exceptions to the Master's reports in the two causes; and dismissing

the complaints for want of equity. Appeal is also made from earlier orders consolidating the two foreclosure actions and denying a motion for change of venue.

The factual background in this matter is an involved and confused one and needs to be discussed only briefly in view of our determination. Appellant-plaintiff, William J. Wagner, hereinafter called Wagner, and Appellee-defendant, Michael David, hereinafter called David, lived together from 1937 until Wagner's marriage in 1954, except for the period 1942-46 when Wagner was in the armed service. The relationship appears to have been a close one with the parties mingling their respective earnings with little or no effort at efficient accounting. In 1937 a house was purchased in David's name but it is agreed at least part of the down payment was Wagner's money. In 1941, an apartment building was purchased in the names of David and Wagner jointly, but Wagner, at David's request, conveyed his portion of the title to David while he was in the service. In 1946, a hotel was acquired in David's name with the properties purchased earlier used as additional security for the necessary mortgage loan. A second hotel was subsequently purchased in Wagner's name.

Throughout these years there was a bewildering exchange of monies, correspondence and documents to which radically different interpretations have been placed by the contesting parties. It is agreed that in 1947 David contemplated a visit to his native Hungary and that it was agreed some of these matters should be arranged for Wagner's protection in the event David was unable to return. Accordingly, the two visited David's attorney who prepared mortgages from David to Wagner on the aforementioned apartment building and first hotel in the amounts of $20,000 and $40,000

respectively. The mortgages were dated September 9, 1947, and executed by David together with notes which they secured. The contest principally concerns the question of delivery of these instruments to Wagner and whether they were supported by sufficient consideration.

Separate complaints were filed to foreclose the two mortgages on October 3, 1955, the hotel foreclosure as Case Number 55-890 and the apartment building as Case Number 55-891. Both cases were referred to a master for hearings and reports. On December 3, 1956, hearings commenced in Case No. 891 which were not concluded until December 30, 1958; The master filed his Supplemental and Final Masters Report on March 24, 1961, which was taken under advisement by the Court. On February 20, 1961, Case No. 55-890 was re-referred to the master who commenced hearings on that matter on February 27, 1961. Although his report was not filed until June 5, 1964, the hearing itself was apparently concluded that same day. It is important to note that separate hearings were held on the two foreclosures and separate reports filed by the master. Very little evidence was introduced during the hearing in 55-890 and no defense was presented.

On April 2, 1964, an order was entered consolidating the two causes on the motion of attorneys for David over objection by Wagner's counsel. It appears that at that date the Court was unaware that separate hearings had been completed on the two causes.

Section 51 of the Civil Practice Act provides: "An action may be severed, and actions pending in the same Court may be consolidated, as an aid to convenience, whenever it can be done without prejudice to a substantial right." (Ill. Rev. Stat. 1963, Chapt. 110, Par. 51)

Ordinarily, the consolidation of lawsuits is left to the discretion of the trial court. Ruggles v. Selby, 25 Ill. App. (2d)1,21The purposes of consolidation are to expedite the resolution of lawsuits, conserve the time of the court and to avoid additional expenses caused by unnecessary duplication. The discretion normally is exercised liberally by trial courts but should never be used to prejudice rights of the litigants. Peck v. Peck, 16 Ill. (2d) 268, 275.

It is evident that the consolidation in the instant case does not serve the purposes intended. The matters had already been heard separately by the master and the duplication of effort and expense already expended. It would be necessary for the court to refer to both reports in arriving at its decision and the conservation of its time would be slight.

More important, the consolidation did prejudice a substantial right of one of the parties, Wagner. As we have seen, the hearing on 55-891 was extensive and bitterly contested. However, the record of 55-890 contains little more than an offer of a prima facie case by Wagner and could not, by itself, support the dismissal ordered after consolidation. In view of these circumstances, it is our opinion that the trial court abused its discretion in ordering the consolidation of the two cases and that order is reversed.

Wagner also urges that the denial of his motion for a change of venue was reversible error. Wagner had complained on at least two occasions to the Chief Judge of the Circuit Court in regard to the long and unexplained delay in bringing these suits to conclusion. These complaints had been brought to the attention of the trial judge. On May 21, 1964, Wagner filed his motion for change of venue supported by

an affidavit referring to the complaints and to the fact that Wagner had only recently learned that the trial judge was aware of them. The affidavit stated further that, as a result, the trial judge would be prejudiced against Wagner and that he feared he would not receive a fair and impartial trial. That motion was denied on May 25, 1964. The trial judge indicated that the motion was denied because he was, in fact, not prejudiced and that he had already considered certain matters in the case.

It is generally held that when a petition or motion asserting prejudice of the trial judge is both timely and in proper form, a change of venue is an absolute right. Miller v. Miller, 43 Ill. App. (2d) 214, 215. The motion to be timely must be made at the earliest practical time after the moving party has discovered the prejudice and before the court has ruled on any substantive issue in the case. Paramount Paper Tube v. Capital Engineering, 11 Ill. App. (2d) 456, 461.

The motion in this case was in proper form and appears to have presented as soon as Wagner learned that the trial judge was aware of his complaints. The court had made several preliminary rulings in the cases before the motion was presented. However, none of these rulings concerned any substantive issue in either case. Under these circumstances, the change of venue should have been granted as a matter of right and the trial court was in error when it was denied.

As stated above, the orders of consolidation and denying the change of venue are reversed; the cases are remanded with directions to grant the change of venue and to vacate all orders entered in either cause subsequent to May 25, 1964.

REVERSED AND REMANDED WITH DIRECTIONS.

Davis and Moran, J. J. Concur.

No. 65-12

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT.

WILLIAM J. WAGNER, Plaintiff-Appellant, vs. MICHAEL DAVID, DAVID BUILDING CORPORATION, an Illinois Corporation, and HOME BUILDING AND LOAN ASSOCIATION, an Illinois Corporation, Defendants-Appellees.	)	
AND		Appeals from the Circuit Court of the Sixteenth
WILLIAM J. WAGNER, Plaintiff-Appellant, vs. MICHAEL DAVID and DAVID BUILDING CORPORATION, an Illinois Corporation, Defendants-Appellees.	)	Judicial Circuit, Kane County SUPPLEMENT TO OPINION

MR. PRESIDING JUSTICE ABRAHAMSON DELIVERED THIS SUPPLEMENT TO THE OPINION:

On the Defendants' Petition for Rehearing our attention is called to the proceedings in Case # 55-890. The proofs came to a halt with plaintiff's request to certify a question of evidence to the Chancellor in the hearing pending before the Master. We are unable

to determine if the plaintiff's proofs had been completed but find that the defense had no opportunity to proceed. Upon the entry of the Order of Consolidation the defendants' relied upon the proofs submitted in Case # 55-891 as determinative of the defense in Case # 55-890. Now that we have reversed the trial court's Order of Consolidation, upon the remandment, all of the parties in Case # 55-890 should have equal opportunity to make such proofs as they deem necessary.

MORAN, J. and DAVIS, J. concur.

285

50886

65 I.A.2285

EARL R. FOSWOLD and A.R. STARR,

Plaintiffs-Appellants,

v.

DOMESTIC UTILITY SERVICES CO. and VICTOR YACKTMAN,

Defendants-Appellees.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This appeal comes from an order entered in the Circuit Court of Cook County, September 23, 1965, denying the plaintiffs' motion for a temporary mandatory injunction.

The findings of the Court below, incorporated in the order, include:

> "1. The plaintiffs' Complaint, Amended Motion for a Temporary Mandatory Injunction and the defendants' answers to each respectively, presents a justiciable issue requiring evidence to be heard and proofs to be made by the plaintiffs tending to substantiate their allegations prior to the Court granting the plaintiffs a Temporary Mandatory Injunction, and accordingly, the plaintiffs are granted leave to introduce such proofs.
>
> "2. The plaintiffs refuse to introduce any evidence or proof which might tend to substantiate the allegations set forth in their Amended Motion for a Temporary Mandatory Injunction by them sought, and further refuse to proceed with the hearing upon their motion.
>
> ..."

The record shows that the Court below refused to hear the parties' proofs in this case, saying that he was far too busy. The record also shows that the Court below made arrangements with a master to hear the matter immediately and that the plaintiff refused to proceed before the master on the grounds that the Court did not have the authority to refer the matter but must hear the case himself.

The appellant argues that the insistence of the Chancellor in referring the motion for an injunction to a master was improper because there was no issue of fact, leaving the Court below only with a matter of law for his determination, and because such reference is not

permitted by the rules of the Supreme Court. All parties proceeded in this court on the basis that the appellant was willing to present evidence before the Chancellor had he been willing to hear the matter at that time.

The amended motion for a temporary injunction alleges that the appellants reside in an unincorporated area of Maine Township near the village of Glenview. These appellants are supplied with water by the appellee, Domestic Utility Services Co. (hereinafter called Domestic), and Domestic is "either the only or the principal utility company supplying water and sewer service in the unincorporated areas of Maine Township..."

It is alleged that Domestic services homes adjacent to the plaintiffs' homes and that "It also provides sewer and water service to the nursing home occupying a large tract of land immediately adjacent to and east of the home of plaintiff Starr." The appellants alleged that they had used septic tanks for years but determined in 1964 "that the use of such septic systems was inconsistent with their public health."

The appellants built a sewer line at their own expense "to interconnect with the sewage main of Domestic at the most convenient, economical and feasible point which they believed would be at Chester Avenue and Dempster Street." The appellants had received sewer tie-in permits from the Greenwood Avenue Sewer Company, but determined that it would be uneconomical for them to build a sewer that would tie in with the Greenwood line. It is alleged, however, that, "The defendants as operators of a public utility are estopped from demanding that plaintiff interconnect at Greenwood Avenue or any other point than the closest and the most efficient interconnection in that ultimately they will or may acquire such facility and, as a public utility, they are duty-bound to acquire or construct their facilities at the lowest possible cost."

Attached to the complaint is a permit issued by the Metropolitan Sanitary District of Greater Chicago which gives permission for the

appellants' sewer main to be built.

The appellees admit that the appellants applied to the Sanitary District for permission, but allege that the issuance of such permit does not create a vested right in the appellants to interconnect with Domestic's sewer main in the absence of having first received the approval and consent of Domestic, and also state that the Sanitary District issued its permission under the impression that the appellants had permission to interconnect with Domestic's line, when in fact they did not have such permission.

The appellees also deny that the permit from Greenwood Sewer Company gives the appellants permission to tie in their sewer to Domestic's line. There are other allegations by both sides which are unnecessary to discuss here.

We feel that the Court below was correct in deciding that there were questions of fact and that a hearing was required before the rights of the parties could be properly determined. For example, the relationship between the Greenwood Avenue Sewer Company and Domestic was a question of fact which could have had a bearing on the rights of the appellees to prevent the appellants from hooking up their sewer main to Domestic's. Another question of fact is whether or not the Sanitary District misapprehended the facts when it granted permission to the appellants to construct their own sewer line. There are other questions of fact which we could mention, but nothing more is needed to show that there were questions of fact for determination.

The one question remaining is whether or not the Chancellor had the power to require the parties to present their proofs before a master rather than hear them himself. This matter was decided in the case of American V.P. Co. v. McNeely Gen. C. & E. Co., 37 Ill. App.2d 403, 185 N.E.2d 711 (1962). That case held that the court in a chancery action or an action at law could, in the exercise of his sound discretion, refer the cause to a master or referee under the authority

of sec. 61 of the Civil Practice Act. (Ill. Rev. Stat., 1963, Chap. 110, Sec. 61.)

> "Subject to rules, the court may in any chancery action, or in any action at law in which matters of account are in controversy, on default or upon issue joined, refer the cause to a master or referee to take testimony and report his conclusions thereon."

The Court in discussing this section noted that the only limitation upon the Court's power to make such a reference as was made in the instant case are the words, "Subject to rules."

The only rule which would have a bearing on this matter is rule 14-1 of our Supreme Court which reads:

> "In any chancery action or in any action at law in which matters of account are in controversy, on default or upon issue joined, the court may refer the cause to a master in chancery who is continued in office by the judicial amendment to take testimony and report his conclusions thereon. A reference to a master shall be the exception and not the rule...." (emphasis added)

The court in American V.P. Co. v. McNeely Gen. C. & E. Co., supra held that the rule is precautionary only, and we hold that the reference to a master was a matter for the discretion of the Court below. The Court below did everything in his power to see to it that the master would give prompt attention to the appellants' motion for a temporary mandatory injunction. The appellants refused to present their case before the master and the Court was acting well within its authority in denying the motion. The order is affirmed.

ORDER AFFIRMED.

BURKE, P.J., and LYONS, J., concur.

50428

SOCIETY OF THE DIVINE WORD,

Plaintiff-Judgment-Creditor,

v.

MAURICE H. KAMM,

Defendant-Judgment-Debtor,

ROBERT G. WOLFE, Trustee of Continental Investment Trust,

(Third Party), Respondent-Appellee,

and

BANKERS FINANCE COMPANY,

(Adverse Claimant), Petitioner-Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Bankers Finance Company appeals from an order of the Circuit Court entered on January 18, 1965, dismissing its petition seeking relief under an order entered on March 21, 1963, in the same court in a supplementary proceeding. The order of March 21, 1963, found and decreed that a certain note executed on April 25, 1962, by Robert G. Wolfe, sole trustee of the Continental Investment Trust, was owned two-thirds by Robert G. Wolfe, individually and one-third by Bankers Finance Company. The court directed the trustee to make the current payments. Subsequently, in a supplementary proceeding in the United States District Court for the Northern District of Illinois, in a case entitled Clinton B. Snyder v. State-Wide Properties, Inc., and Maurice Kamm, the ownership of the note of April 25, 1962, was again put in question. On May 28, 1964, the District Court entered an order finding that there was a total of $63,526.56 due on the note, of which Robert G. Wolfe and Bankers Finance Company were entitled to $44,914.66 to be paid to them first and the balance to be paid to Clinton B. Snyder. Bankers Finance Company and Clinton B. Snyder appealed from the order. Bankers Finance Company and Clinton B. Snyder having composed their differences, dismissed their appeals. When Bankers made a demand upon Robert G. Wolfe as trustee to

make payment, he refused, claiming that he had an agreement with Harold Shlensky in behalf of Bankers Finance Company that Bankers would appeal for him and pay all the costs of the appeal and that Bankers would extend the payments on the note to commence on February 3, 1965.

The trial court, from the oral and documentary evidence found that after the entry of the order in the Federal District Court an agreement was entered into between Harold Shlensky, representing the Bankers Finance Company and Robert G. Wolfe, trustee of Continental Investment Trust, that these parties would jointly appeal from the order entered by the District Court on May 28, 1964 and that the appeal was to be in the name of Bankers; that subsequently, Bankers, through Shlensky and Wolfe, trustee of Continental, entered into a further agreement that in consideration of Wolfe, as trustee, consenting to dismissal of the appeal, Bankers agreed that the monthly payments stipulated in the Continental Investment Trust note of April 25, 1962, commence on February 3, 1965, in lieu of commencing June 15, 1962, as provided in the note and that the monthly payments shall be in the amount of $942.50 each; that the amount due under the note and the interest thereon were not changed by the agreement from the previous determination by the U.S. District Court; that thereafter, pursuant to the agreement, Wolfe consented to the dismissal of the pending appeal in the Federal Court of Appeals and the appeal was in fact dismissed by agreement of the parties.

The appellee and respondent, Wolfe, recognize the validity of the first point presented by the appellant, Bankers, that the burden of proof was upon Wolfe to establish his affirmative defense by a preponderance of the evidence. We are of the opinion that the trial court's findings are supported by the evidence. The trial judge heard and saw the witnesses and we must give due weight to his superior advantage in passing on the facts and judging the credibility of the witnesses. Hood Const. Corp. v. Clark-Randolph Prop., Inc., 347 Ill. App. 432; Jorn v. Tallett, 341 Ill. App. 240. The respondent, who had the burden of proving his affirmative defense

by a preponderance of the evidence, presented oral and documentary evidence from which the trial judge had the right to and did find the factual issues in favor of respondent. We agree with the respondent that there was no attorney-client relationship between petitioner and respondent at the time the pertinent order of the Federal Court was entered. The transaction between the petitioner and respondent pertaining to the note took place while the petitioner was at all times represented by its attorney, Richard W. Burke. The record shows that contrary to the position of Bankers, the consideration for the extension agreement, was the waiver by the respondent of the right of appeal from the Federal Court. A further consideration was the obligation assumed by the plaintiff in the Federal Court case to pay $2,000 to Bankers. Petitioner (appellant) thus received $2,000 in excess of the amount petitioner was awarded in the Federal Court order. For these considerations Bankers agreed to the revised payment schedule under the Continental note.

Bankers advances the proposition that the Circuit Court order of May 28, 1964, was res judicata of the amount due on the day the order was entered. Respondent agrees and the trial court so found. Being a civil case the parties had a right, subsequent to the entry of the judgment, to enter into a valid agreement that payment on the judgment begin on February 3, 1965, instead of June 15, 1962. The trial judge found that an agreement to this effect was entered into by the parties subsequent to the entry of the Federal judgment. The order of the Circuit Court entered on January 18, 1965, established the agreement of the parties as to the time of payment.

The plaintiff in the Federal Court, Snyder, the respondent herein, Wolfe, as trustee, and Bankers, appellant herein, were dissatisfied with the judgment and decided to appeal. In discussions these parties concluded that considering the expense and delay in the appeal and the

uncertainty of the result, it would be wise to settle the dispute. This was done. The evidence substantiates respondent's position that there was an understanding between them that Bankers'appeal would protect the interests of respondent. In agreeing to the dismissal of the appeal, there was adequate consideration to Bankers, Wolfe, as trustee, and to Snyder, plaintiff in the Federal Court case. The order is well supported by the law and the evidence.

Therefore the order is affirmed.

ORDER AFFIRMED.

BRYANT, J., and LYONS, J., concur.

50301

MARQUETTE NATIONAL BANK, a National Banking Association, as Trustee under Trust Agreement, dated December 1, 1961 and known as Trust No. 2013,

Plaintiff-Appellant,

v.

VILLAGE OF OAK LAWN, a Municipal corporation,

Defendant-Appellee.

65 I.A.2 286

APPEAL FROM
CIRCUIT COURT
OF COOK COUNTY

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This is an appeal from an order entered September 19, 1963, in the Circuit Court, which found a zoning ordinance of the appellee, Village of Oak Lawn, valid as applied to the land of the appellant.

On October 9, 1951, the Board of Trustees of the Village of Oak Lawn, Illinois, adopted a zoning ordinance pursuant to authority granted by the Statutes of the State of Illinois, Ill. Rev. Stat., 1951, Art. 24, Sec. 73, providing for classifying, regulating and restricting the location of trades and industries and the location of buildings designed for specified uses; regulating and limiting the height and bulk of buildings hereafter erected or altered; regulating and determining the area of yards, courts and other open spaces within and surrounding such buildings; establishing the boundaries of districts for said purposes and prescribing penalties for the violation of its provisions.

Thomas Harney, a beneficiary of the trust under which the plaintiff holds title to the subject realty, is the real party in interest. He is a partner in the firm of Travers and Harney, engaged in home and apartment construction business since 1954. During this time, 9 years, they built fifteen 3 and 4 flat buildings. All of said buildings were constructed on sites zoned for and located in areas devoted solely or predominantly to apartment and multiple family use. He is therefore the beneficial owner of and is in possession of the following described real estate situated in the Village of Oak Lawn.

"Lots 13 to 22, inclusive, and the South half of the vacated alley lying north of and adjoining said lots in Block 6 in Charles Wadsworth's subdivision of the East 661.05 feet of the South 120 acres of the Southeast quarter of Section 10, Township 37 North, Range 13, East of the Third Principal Meridian, in Cook County, Illinois."

He acquired this subject site in November, 1959 or 1960, eight or nine years after the property had been zoned.

Harney never applied for an apartment building permit for this site because it had to be rezoned first. He first inquired about such permit about November 1961, not of the Village of Oak Lawn but a Mr. O'Malley. This was his first knowledge that the property had to be rezoned. Mr. O'Malley had sold the parcel to Mr. Matheson, who, in turn sold it to Harney. After his discussion with O'Malley, Harney petitioned the Oak Lawn Zoning Board of Appeals for a change in zoning to apartments. A hearing was held and the requested change in zoning was denied. On appeal to the Board of Trustees, the zoning change was also denied.

The subject realty is situated in the second block west of Crawford Avenue, on the north side of 103rd Street, rectangularly shaped, its length of 264.7 feet fronts on 103rd Street, its sides having a depth of 135 feet, face Komensky Avenue on the East and Karlov Avenue on the West. It is zoned for residential district A-1, which is single family dwellings in residential districts. It is surrounded by that type of zoning except across Komensky Avenue, where B-2 zoning is permitted, which is for multiple residences. He desired to construct multiple dwellings on the premises, for which a permit could not be given under the existing zoning. He thereupon brought this action against the Village of Oak Lawn.

After a careful analysis of the contentions concerning the property in Standard State Bank v. Village of Oak Lawn, 29 Ill.2d 465, 194 N.E.2d 201 (1963), which includes the property purchased by Mr. Harney, the Supreme Court held that paramount of all the factors considered in

reaching a determination as to whether the application of a zoning ordinance to a particular parcel of realty is whether the subject property is zoned in conformity to surrounding existing uses and whether those uses are uniform and established. Bennett v. City of Chicago, 24 Ill.2d 270, 181 N.E.2d 96 (1962); River Forest State Bank v. Village of Maywood, 23 Ill.2d 556, 179 N.E.2d 637 (1962); Wehrmeister v. County of DuPage, 10 Ill.2d 604, 141 N.E.2d 26 (1957). The subject area in this case has been most recently examined by the Supreme Court in Standard State Bank v. Village of Oak Lawn, supra. The zoning is there described as follows:

> "The surrounding property is uniformly zoned A-residential.... One Hundred Third Street is zoned B-1 for a distance of 600 feet eastward from Cicero Avenue, and a shopping center and bowling alley are located on the northeast corner of that intersection, while gasoline stations occupy the other corners. A funeral home presently occupies the south side of 103rd Street across from the shopping center. Other than these, no zoning other than A-residential exits within the one mile segment of 103rd Street between Cicero Avenue on the west and Crawford Avenue on the east except at the intersection of Crawford with 103rd where B-1 zoning extends one block westward to Komensky Avenue.....Eighty-four percent of the one mile distance between Cicero and Crawford Avenue on 103rd Street is A-residentially zoned.....(Emphasis supplied)
>
> "One Hundred Third Street itself is a two-lane concrete street carrying approximately 11,000 vehicles per day. Outside of the B-1 use previously described there is no use or development on 103rd Street between Crawford and Cicero other than single family dwellings with the exception of one lawfully nonconforming use 4 1/2 blocks east of the tract in question; this nonconforming use consists of a single family residence in which a real estate office is located. There is a 1 1/2 single-family dwelling located 1/2 block south of the southeast corner of the subject property on Kilbourn Avenue, with steps leading to the entrance five feet above grade and two connected oil tanks on the exterior of the building. While this could presumably be used as a two family dwelling, there is no testimony that it is so occupied."
>
> ...
>
> "It is clearly apparent...the predominant characteristic of the neighborhood is its single family residential development..."

Zoning, being an exercise of the police power of the state, cannot be used to give economic advantage to the owner of a single parcel over that of surrounding owners except where required by the public health, safety or morals. Kennedy v. City of Evanston, 348 Ill. 426, 181 N.E. 312 (1932); Weseman v. Village of La Grange Park, 407 Ill. 81,

94 N.E.2d 904 (1951). Again, it is a well established principle that one who buys land has a right to rely upon the classification which existed at the time the purchase was made, and upon the rule of law that it will not be changed, unless the change is required for the public good. Cosmopolitan National Bank of Chicago v. City of Chicago, 22 Ill.2d 367, 176 N.E.2d 795 (1961); Bolger v. Village of Mount Prospect, 10 Ill.2d 596, 141 N.E.2d 22 (1957); Weseman v. Village of La Grange Park, supra.

The controverted zoning ordinance protects against depreciation and therefore has a reasonable relationship to public welfare. As was said in the Bolger case, supra:

> "The fixing of boundary lines, unless arbitrary or capricious, is a matter of legislative judgment which courts will respect. Necessarily, residential property immediately abutting the line will be less valuable than property more remote from the boundary of a commercial zone. DeBartolo v. Village of Oak Park, 396 Ill. 404; Evanston Best & Co. v. Goodman, 369 Ill. 207. But that affords no justification for the constant erosion of such boundaries."

At best, the evidence in this case discloses room for a difference of opinion concerning the reasonableness of the challenged zoning classification in its application to appellant's parcel. This being so, the determination of the municipal authorities should be respected. The cases hold, without exception, that their judgment is conclusive. Exchange National Bank of Chicago v. County of Cook, 25 Ill.2d 434, 185 N.E.2d 250 (1962); Fox v. City of Springfield, 10 Ill.2d 198, 139 N.E.2d 732 (1957).

As this court observed in Reskin v. City of Northlake, 55 Ill. App.2d, 184, 190, 204 N.E.2d 600, 603:

> "The subject property had been zoned residential since 1954 * * *. Plaintiff's acquisition of the property in 1961 must be considered to have been made with knowledge of these enactments by the City."

Harney complains that the subject property lies across the street (Komensky) from the B-2 district.

> "'It is axiomatic that zoning must begin somewhere and end somewhere.' (DeBartolo v. Village of Oak Park, 396 Ill. 404, 411;) so, even though property touches on industrially zoned areas, a residential classification is not thereby necessarily precluded. Because of the large residential area adjoining the instant property, the fact that the only means of access to the property is through that area, the evidence of loss in market value likely to result to nearby residences from the requested classification change, and the feasibility of using the property for residential purposes, we cannot say the village acted unreasonably in drawing the line where it did." Williams v. Village of Schiller Park, 9 Ill.2d 596, 598, 138 N.E.2d 500, 501 (1956).

The zoning of the Village of Oak Lawn in this case is not arbitrary or capricious. The judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., and LYONS, J., concur.

50687

65 I.A.2472

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. R. W. THOMPSON (whose first name is unknown to said Grand Jurors [Impleaded]), Defendant-Appellant.	APPEAL FROM CIRCUIT COURT COOK COUNTY CRIMINAL DIVISION.

MR. PRESIDING JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

The defendant, R. W. Thompson, was indicted with Ronald Doss for the crime of armed robbery. He had a jury trial, and at the close of the case the charge was reduced to robbery. The jury returned a verdict of guilty. Motion for new trial and motion in arrest of judgment were denied. The court entered judgment on the verdict and the defendant was sentenced to from five to ten years in the penitentiary. The defendant, R. W. Thompson, took an appeal by writ of error to the Supreme Court of Illinois, which court transferred the case to this court.

The defendant here argues that the evidence failed to establish the "requisite proof that force or the threat of the imminent use of force was exerted and that the persons robbed were in fear for themselves." He also argues that the complaining witnesses were in a state of intoxication and this negated any present fear, and that the evidence was not sufficient to support a conviction.

Michael O'Hara, one of the complaining witnesses, testified that he and Gordon Henkel went out the night of September 15, 1962; that they visited a tavern where he, O'Hara, drank 20 glasses of beer; that he drank two bottles of beer at a second tavern, and one bottle at a third. He stated that Henkel drank five or six beers from 8:00 p.m. to 1:30 a.m., and later had another bottle of beer at the last tavern they visited. Both O'Hara and Henkel testified that they went to the last tavern to inquire about a job for Henkel; that as they left the tavern O'Hara was solicited by a prostitute and that he

engaged her in conversation while walking along 65th Street between Cottage Grove and Ingleside Avenues, around the corner from the last tavern they had visited. While O'Hara was walking along in conversation with the woman, Henkel fell behind when he developed a severe stomach ache. The time was about 3:00 a.m. They walked away from Cottage Grove on 65th Street, and while walking back towards Cottage Grove from Ingleside or Drexel Avenue, five or six persons arrived on the scene and commenced to go through the pockets of O'Hara and Henkel. Henkel said he had a glimpse of a weapon. O'Hara did not see any weapon. The woman left as soon as the men approached them. O'Hara testified that the men told them to "put your hands in the air,"that the order was obeyed, and that the men took $6.00 from his pockets. Defendant Thompson was talking to the victims during this time, asking them what business they had in the neighborhood.

In court Henkel identified Thompson. Henkel testified to the beer drinking and corroborated O'Hara's testimony that five men had approached them, identifying Doss and Thompson, and said they were told to put their hands up and they obeyed. He stated that Doss started to search him. When the police cars came Henkel ran after Doss because Doss had taken all of Henkel's belongings. As Doss was running away Henkel tackled him, and the police ran down the alley and caught Thompson. Henkel testified that he had lost a pocket watch, a glass cutter, a cigaret lighter and a ballpoint pen, together with $12.00 in cash. He identified the lighter which was introduced in evidence and stated that he had not seen the lighter after the robbery until Doss took it out of his pocket in response to the order of the police.

Wesley Ross testified on behalf of the State that he was a janitor; that he was going to look after the fire in one of his buildings; that he saw the robbery and heard the five men tell O'Hara and

Henkel to hold up their hands; that one was going through their pockets and another one was talking. He identified both Doss and Thompson in court and stated that Doss was going through Henkel's pockets; that Thompson was doing the talking; that when the police came Thompson ran, but was caught; and that Henkel had caught Doss.

Two police officers testified that in response to a call they went to the scene of the robbery and saw a group of men, two of whom were O'Hara and Henkel. They stated that Doss was being held by Henkel, and Thompson was running west on 65th Street. Hammond, one of the officers, stated that he chased Thompson and arrested him. He identified him in the court room. His partner, Frank Neu, arrested Doss who was being held by Henkel. Officer Hammond identified the cigaret lighter and stated that the first time he saw it was when it was taken from Doss' pocket. Frank Neu corroborated the testimony of Hammond.

Doss testified in his own defense as follows: He had been visiting a friend until about 3 o'clock on the morning of September 16; that after two men had stopped him and had asked for money for a drink, which he gave them, he started walking towards Ellis Avenue. The people were standing about a block from where the witness said the robbery took place. As he walked up to the group of men someone yelled "Police," and everybody started running. One fellow grabbed him and threw him down, and when the police came the person who had thrown him down (Henkel) told the police that he, Doss, had robbed him. The police searched Doss and found nothing on him. After the police had handcuffed him he looked down on the ground and saw the cigaret lighter; he picked it up and handed it to the policeman who told him to keep it. He put it in his pocket. In the police station a police officer searched him and found the lighter in his pocket. He stated that he had not robbed anyone and that he did not know Thompson.

Thompson testified that he lived at 6527 South Drexel; that he had been to a friend's house prior to his arrest; that at the friend's house they had a whist game and there was considerable drinking. He said he saw a group of people, then saw a woman break loose from them and come running down the street behind him, that he ran to the corner and was standing there when the police officer came and arrested him. He told the officer he had been drinking beer at a friend's house; the officer then brought him back to the police station. One of the complaining witnesses said Thompson looked like one of the men with the group which had robbed them. When Thompson was searched he had only 32 cents in his pocket. He testified that at the time he was arrested he was pretty drunk.

Frank Neu, a police officer, was called as a rebuttal witness by the State, and testified that he had originally arrested Doss and that from the time he arrested him until he drove off in the wagon, he was present with him at all times; that he did not see him reach down and pick up a lighter, nor did he hear any police officer converse with him regarding a lighter. He did not see any officer place a cigaret lighter in his pocket, and he did not place Doss in handcuffs when he was first arrested. He was handcuffed when he was put in the wagon by the wagon crew. Neu had originally searched Doss to feel for a weapon but he did not go into his pockets.

In the Criminal Code (Ill. Rev. Stat. 1963, ch. 38, § 18-1) robbery is defined as follows:

> "A person commits robbery when he takes property from the person or presence of another by the use of force or by threatening the imminent use of force."

In People v. Bodkin, 304 Ill. 124, 136 N.E. 494, there is a discussion of what evidence is sufficient to convict a defendant of the crime of robbery under a statute containing essentially the same definition. Ill. Rev. Stat. 1959, ch. 38, § 501. In that case is cited Horn v. State, 89 Tex. Crim. 220, where the court said:

> "If under the circumstances and conditions surrounding the transaction he has a reasonable belief that he may suffer injury unless he does comply with the robber's request, the 'fear' required by law is present."

The court also quoted from Russell on Crimes (vol.2,1910 ed.1137, 1138); as follows:

> "The extortion of property by fear is robbery though the property be taken as a colorable gift. So that if a man, whether with or without an offensive weapon, but with such circumstances of terror as indicate a felonious intention, asks alms from a person, who gives to him through a fear of violence, it will be robbery. . . . It is enough if the fact be attended with such circumstances of terror, such threatening by word or gesture, as in common experience are likely to create an apprehension of danger and induce a man to part with his property for the safety of his person."

In the instant case two complaining witnesses at 3:00 a.m. were ordered to hold up their hands, with five men surrounding them, which men then proceeded to go through their pockets, taking their money and whatever valuables they had. To take the view that this is not robbery as defined in the statute would be utterly absurd. The defendant denied that he was guilty of any crime. The jury believed the testimony of the witnesses who testified on behalf of the State. This they had a right to do, and the court indicated its approval of the verdict by denying the motions for new trial and arrest of judgment. There is no doubt in our minds that under the evidence in the case the defendant was properly found guilty. The attempt of counsel to show that the complaining witnesses were in a drunken stupor lacks any support in the evidence.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

DRUCKER, J., and ENGLISH, J., concur.

Publish abstract only.

filed Dec 10. (487)

No. 65-23 (65 I.A 2487)

In The

APPELLATE COURT OF ILLINOIS

Third District

A. D. 1965.

A

Abstract

FARMALL EMPLOYEES CREDIT UNION, Plaintiff—Appellee, vs. P. J. WADSAGER, ROBERT PULVER, HARRY RUSSELL and LEROY PARR, Defendants—Appellants.	)	Appeal from the Circuit Court of Rock Island County, Illinois. Honorable J. P. Wilamoski, Judge Presiding.

ALLOY, P. J.

This is an appeal from a judgment of the Circuit Court of Rock Island County as against P. J. Wadsager, as principal, and Robert Pulver, Harry Russell and Leroy Parr, as co-signers, arising from a judgment by confession on a note in the sum of $1,966.60 in favor of Farmall Employees Credit Union. After judgment had been entered for the amount indicated, the co-signing Defendants (not including Wadsager, the principal) filed a motion to vacate the judgment supported by affidavits. The motion was allowed and Defendants thereafter filed their answer setting out an affirmative defense to the effect that fraud by Plaintiff's agent induced the three Defendant co-signers to sign the note in question. It was asserted that there was a positive representation by Plaintiff's agent that disability insurance and life insurance, under a blanket coverage policy purchased by Plaintiff, was in force and effect

on the life and to cover possible disability of the principal obligor, Wadsager. As a matter of fact, there was no disability insurance on him. Wadsager later became disabled.

Plaintiff in a counter-affidavit asserted that the principal obligor was sixty-three years of age at the time of making the loan and, therefore, was not qualified for disability insurance. Plaintiff also contended that Defendants knew of the limitation on coverage by insurance and denied that the representation as to disability coverage was made or that Defendants relied on Plaintiff's assurances. There was no evidence on hearing to support any of such contentions of Plaintiff.

In a trial on the merits, thereafter, the evidence specifically indicated that the Defendant Wadsager requested the other three Defendants to co-sign his note at the credit union and they had at first refused. They then decided that if the principal obligor was covered by disability and life insurance on the loan, they would co-sign for him. Each Defendant at separate times went to the general manager of the credit union and asked him whether there was disability insurance and life insurance on Wadsager to cover the loan obligation. They were advised by the general manager that there was such insurance, and each of the Defendants testified that, relying on the general manager's statement, they were thus induced to co-sign the note. The manager of the credit union did not deny such talks with the three Defendants but stated that he did not know the borrower Wadsager's age at that time. He pointed out that if a borrower is under the age of 60 and becomes disabled, the insurance company would pay the claim and that such blanket insurance is made available to all borrowers by the insurance company. He did not, however, advise the three Defendant co-signers of this situation as to insurance or discuss the question of age with the Defendants.

From the facts in the record, it is apparent that there was an uncontradicted representation of coverage as to disability by the Plaintiff's general manager to the three co-signing Defendants and that such representation was relied upon by them. It is not material that the person who makes a representation, which is not true as a matter of fact, had any knowledge as to its truth or falsity if the co-signers relied upon it to their detriment. The Courts of this State have clearly supported the principle that where a party makes an assertion of a fact without knowing it to be true and such representation is relied upon by another, the one who induced the action must suffer rather than he who relies on the representation (BRENNAN v. PERSSELLI, 353 Ill. 630). The co-signers, under the facts before us, reposed confidence in the manager of the Plaintiff and relied upon the statement that there was disability insurance as to Defendant Wadsager. The record indicates that the co-signers would not have signed but for such representation. Plaintiff was not entitled to enforce the note as against the co-signers in view of the fact that the representation as made was not true, even though innocently made by the general manager of the Plaintiff-credit union. It was a representation of such significance and materiality as to constitute a valid defense to an action on the note as against the co-signers in view of the admitted disability of Defendant Wadsager.

The Circuit Court of Rock Island County should have granted the motion to vacate the judgment and recall the execution. This cause will, therefore, be reversed and remanded to the Circuit Court of Rock Island County with directions to vacate the judgment heretofore entered in this cause.

Reversed and remanded with directions.

Stouder, J. and Coryn, J. concur.

Abstract

No. 65-52

65 I.A.2 495

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	Appeal from Circuit
	)	Court, Kane County
CHARLES W. ZAESKE,	)	
	)	
Defendant-Appellant.	)	

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT:

This is an appeal from a judgment of the Circuit Court of Kane County entered on a jury verdict finding the defendant, Charles W. Zaeske, guilty of the crime of arson. The defendant was sentenced to a term of 1 to 3 years in the Illinois State Penitentiary.

Zaeske and one Richard Smith were indicted for burning the home of Herman Hecht without his consent on or about August 31, 1964. Zaeske was lessee of a portion of Hecht's property, including a small office at one end thereof, for a used car lot. Hecht's home was located at the opposite corner of the property. Hecht, a man of advanced years, was apparently friendly to his tenant and would regularly visit with him at the office.

Originally, both Zaeske and Smith entered pleas of "not guilty" but Smith subsequently changed his plea to "guilty" and applied for probation.

The trial was held on February 9, 1965. Only three witnesses testified, all for the State. Witness Williams testified that he was the nephew of Herman Hecht and that he received a telephone call on the evening of August 31, 1964, informing him that his uncle's house was on fire. Williams went to the fire, saw the house burning, and remembered seeing both Smith and Zaeske at the scene.

Witness Alston testified that two or three weeks before the fire the defendant Zaeske told him that he was trying to convince people that Hecht was "crazy" so that Hecht would have to sell the property. He also stated, after considerable prompting by the State's Attorney, that a couple of days after the fire Zaeske informed him that Smith had set the fire. At the time of trial, Alston was in the County jail and had applied for probation.

Smith himself was the principal witness for the State and the only one to attempt to tie the defendant Zaeske with the setting of the fire. Smith had been employed by Zaeske on an informal basis, principally as a car washer. Smith testified that on a certain evening four or five months earlier, he and Zaeske conspired to rob Hecht. When pressed to be more specific in regard to the date of these transactions, he stated that "it was approximately October 30th or something". Over objection, Smith related that Zaeske directed him to enter Hecht's home to steal money while Zaeske and Hecht were having coffee down the street. This act completed and the loot divided, Zaeske then directed Smith to return to Hecht's home and set a fire in a closet so as to destroy certain automobile titles that Hecht kept there. The testimony at this point becomes very confused and it does not appear clear whether Hecht had the titles

in his closet or Zaeske had taken them earlier and wanted to destroy all of Hecht's papers to cover their unauthorized removal. In either event, according to Smith, he returned to the house and set the fire and, after returning to the office to meet with Zaeske, was complimented by him for having done "a very good job of it". On the basis of this evidence, the jury found the defendant guilty as charged.

It is well established that the testimony of an admitted accomplice must be received and acted upon with the greatest caution. People v. Andrae, 295 Ill. 445; People v. DeRose, 359 Ill. 512, 516. Such testimony is fraught with weakness, being that of an admitted criminal and possibly motivated by malice, fear, or hopes of leniency from the prosecution. For these reasons, it is scrutinized carefully and subject to grave suspicion. People v. Hermens, 5 Ill. 2d 277, 285. At common law and in Illinois, it has been held that the uncorroborated testimony of an accomplice can be sufficient to convict if the evidence as a whole establishes the guilt of the accused beyond a reasonable doubt. People v. Bugg, 345 Ill. 210; People v. Gordon, 344 Ill. 422.

It has been also held that where the accomplice has hopes of favorable treatment by the State, his testimony must carry the absolute conviction of its truth to be accepted. People v. Grove, 284 Ill. 429.

In the instant case the witness Smith had entered a guilty plea to the same charge and had a petition pending for probation. His hopes for reward from the prosecution seem obvious. His testimony, even disregarding his confusion as to the date of the fire, lacks credibility. There would be no apparent gain to Zaeske in setting Hecht's

home afire even if he had already stolen the automobile titles as suggested by the State. There is little evidence of ill-will towards Hecht on the part of Zaeske, other than the statements of Alston, and, there is considerable indication that the two were good friends. Hecht's nephew stated that Zaeske furnished clothing to the old man on the night of the fire after his own had been destroyed.

The uncorrorborated testimony of an accomplice is sufficient to convict if the evidence as a whole establishes a defendant's guilt beyond a reasonable doubt. However, under the circumstances we feel that the testimony of Smith fails to carry the conviction of truth and cannot be accepted. His testimony linking Zaeske to the arson is itself completely uncorrorborated and the evidence as a whole fails to establish the defendant's guilt beyond a reasonable doubt.

In view of our determination, we do not feel that it is necessary to consider the other errors assigned.

It does not appear that the ends of justice will be advanced by remanding this cause for a new trial. The judgment is therefore reversed without remandment.

REVERSED.

MORAN, J. and DAVIS, J. concur.